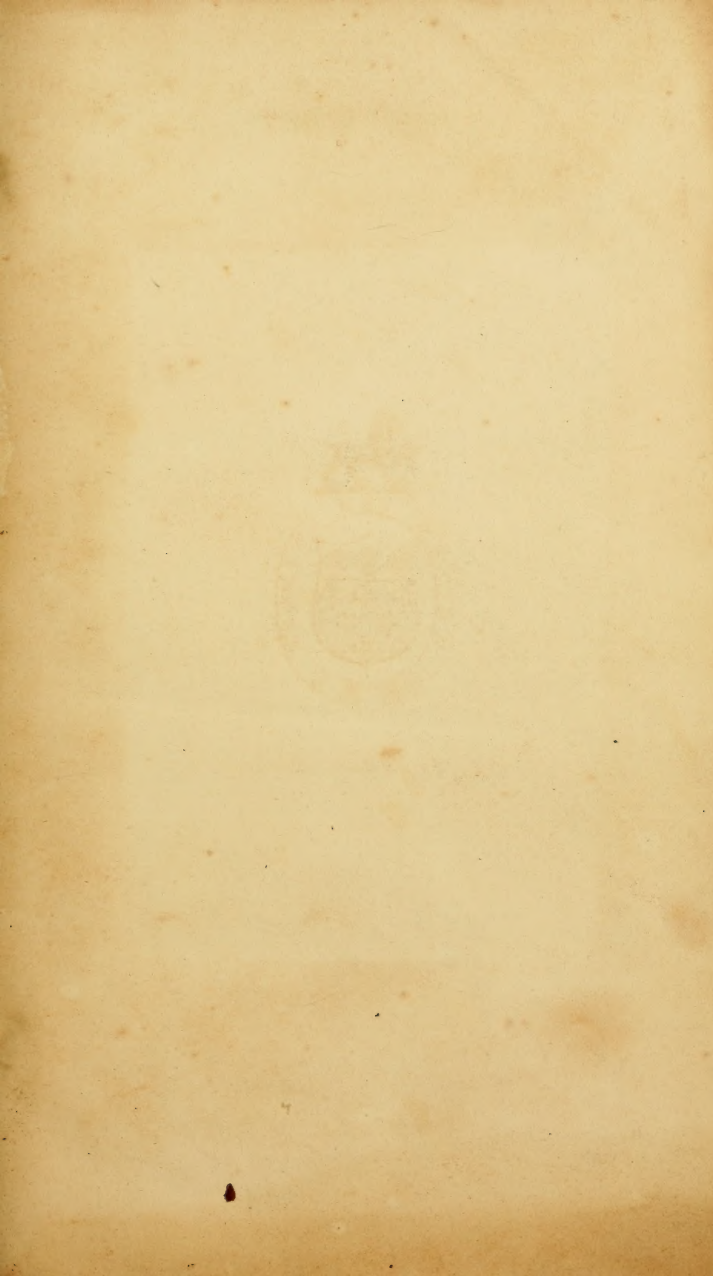


Charles Francis Adams.

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THE STATESMAN,

OR

PRINCIPLES OF LEGISLATION AND LAW.

BY JOHN HOLMES.

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THE STATESMAN

PRINCIPLES OF LEGISLATION AND JUDICATURE

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W. J. ADAMS

ADAMS

1861

ADVERTISEMENT.

I have, at length, finished the volume I intended, embracing *Principles of Legislation and Law, of the State and United States*. By comprehending so much in so limited a space, I may, in some instances, have sacrificed perspicuity to brevity, and in attempting to avoid one extreme may have fallen into its opposite. To condense the *language*, and preserve the *principle*, and enforce the reasons in the fewest, plainest and choicest words, arranged in the best manner, is a perfection in elocution which few attain and to which I do not pretend to aspire.

There is, indeed, in all jurisprudence, a redundancy of words, and so interwoven with the science, that any attempt at correction would probably fail of success. The language of legislation is, of all other, the most prolix, disconnected and redundant. To abridge it, methodize it, and fit it up for general readers, is (however laudable the attempt) an undertaking of time, labor and skill, which few can command. To comment upon *statutes*, with all their repetitions and circumlocution, leads the commentator into the same style, and his language becomes (almost irresistably) *legislative, juridical or professional*.

Errors, no doubt, have escaped me—not very flagrant I hope; but whatever they may be, I am consoled in the belief that some *good-natured* FRIEND will be found, who will *kindly* point them out, so that, should another edition be required, they may be corrected.

I feel persuaded that, with all its imperfections, our *young men* may be improved and edified by it. In most civilized nations the study of the law has been deemed a necessary part of the education of a gentleman—that he ought, at least, to know the laws of his own country, and if he were acquainted with those of others it might be more than merely an ornament. But, in a government such as ours, where the people make and administer the laws, it would seem to be indispensable that every one of ordinary understanding should be made acquainted with the general principles of jurisprudence. We do not mean that every man should become a lawyer, but that he should learn enough to qualify him for an *elector* or *legislator*, and to perform his duties as a citizen. And since ignorance of the law is no excuse for its violation, self preservation requires some progress in legal science. That our *young men*, with their present means and inducements of education, should neglect the study of jurisprudence is inexcusable. And yet many a young American has been detected, in a foreign country, in almost entire ignorance of our own political and civil institutions, conferring thereby no honor on the government, and affording very slender promise of its stability. Our youth are, with a laudable ambition, aspiring to the rank and condition of *statesmen*. But in order to realize their object, they should learn *some* of the *duties* of statesmen. Without this, many are made legislators prematurely, and, in consequence, become humbled at once by the talents and experience of those with whom they are associated, and never afterwards recover.

Should this effort of mine awake a spirit of inquiry, and inspire a zeal to learn and inculcate the principles of free government, it will amply reward

THE AUTHOR.

THOMASTON, MAY, 1840.

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INTRODUCTION.

To comprise within a single volume "Principles of Legislation and Law," of a State and of the United States, is no easy task. The *power of condensation* is of all others the most difficult to execute. In these times, in which speakers and writers seem rather to measure the merits of their performances by the *length*, there is something repulsive in the thought of a condensed view of any thing, and especially of legislation and law. There is, moreover, something so *professional* in whatever relates to jurisprudence, that unless it is *technical* it is not esteemed *learned*, and if it *is* technical none but lawyers are supposed to understand it. But so connected and dependent are legislation and law, that it is necessary that every one who would become a legislator should understand *what the law is*, before he can perceive how it can be improved. As the case now is, many members of our State and National Legislatures, and intelligent men too, are obliged to confide implicitly in the legal profession for the transaction of the ordinary business of the session. This is all wrong. Ours is a *representative* government, and although each member represents the whole community, he is to act also with a special view to the interests of his immediate constituents. If he is obliged to entrust their affairs to some other member, and to rely on his ability and fidelity, he in effect delegates a power which cannot be constitutionally delegated, and one which his constituents especially confided to him. It is a most unfortunate and pernicious error, that a man ignorant of law can be a good *law-maker*; the thing at once appears sufficiently preposterous in itself. It would seem to be an *axiom*, or self-evident proposition which does not admit of controversy, that *we should first learn what the laws are, before we undertake to determine what they should be*. By this it is not intended, that before a man becomes fit to legislate he must have learned the profession and been initiated as an attorney or counsellor of our courts.

Far from it ; as much as I respect the profession, (and no one respects its honorable members more,) I would not increase their numbers proportionably in the State or National Legislatures. They have quite as much influence as they should have. But the business of legislation cannot be done without some of them ; and though I could wish that a more experienced and disinterested portion of the profession were to be found in our Legislatures, yet I would encourage no prejudice against an order of men who are almost the only effectual defence of the weak against the strong, and among whom are many illustrious instances of self devotion to the cause of liberty. But I would not place too much reliance on *any* profession. I would that *every man* of an inquiring mind, and especially one whose ambition might induce him to aspire to a place in the State or National Legislature, should understand *for himself* the duties of legislation and, to this end, the principles of jurisprudence.

The *origin* of government, and of title to property, especially in lands, has been the subject of much nice and critical disquisition. Which preceded the other, or whether both were simultaneous, and, indeed, how individual property was at first acquired, have been matters of much speculation. That soon after the acquisition of property, government, of some sort, was found necessary to protect it, admits of little doubt. And the origin of title, even to lands, as it seems to me, is not involved in that obscurity which is imagined. *The occupancy of ONE, with the acquiescence of THE REST, is the origin of title.* How this "acquiescence" was brought to pass, is, with us, practically illustrated by every case of "settlers" upon the public or proprietors' uncultivated lands. These "settlers" are, for this purpose, men in a state of nature, without civil, municipal or any other law but such as the God of Nature has implanted in them. They are not restrained from depredations upon each other from fear of any paramount claim, as sometimes they expect to hold *subject* to the proprietary title, and sometimes *in defiance* of it. Nevertheless *pre-occupancy* has always been respected. In the actions in our Courts, between these "settlers," it is not *the right* of pre-occupancy, but *which* was the pre-occupant, that is the subject of controversy. And these cases between *mere possessors* are not more frequent than between adjacent owners, each claiming under title. If one man goes into the forest and carves out for himself ("takes up," as he terms it) land sufficient for a farm, and defines it by intelligible metes and bounds ; a more powerful one comes next, not, however, to dispossess him, but to make the next best choice ;

and a third comes after, more powerful, perhaps, than both, but he never usurps the possessions of either of these pre-occupants. Now this mode of appropriating lands to individual use, for purposes of cultivation, is, so far as respects *themselves*, the acts of men in a state of nature. *In regard to them*, it is an original appropriation—each exercising his discretion in selecting for his own use. From the character of these settlers, and a knowledge of their actions and course of reasoning, I am confident in the assertion that no apprehension from a paramount title ever did keep the peace among them. Whether this has arisen from a sense of natural justice, or such a regard for the rights of each other as comports with their own interest and safety, certain it is that titles by possession have been always acquired by respecting and acquiescing in pre-occupancy.

But this inquiry is, perhaps, for us, more speculative than profitable. The *jurisdictional* and *territorial* rights or claims of the native Indians were scarcely distinguishable from each other. Both were in the *tribe* or community, and individual possessions in lands were scarcely known. As the life of the Indian is ambulatory, his occupation of the land was transient and for temporary purposes, and common to others with himself. The treaties of cession by the chiefs or head men, with the consent of the tribe, and the charters of the European *discoverers*, ceding the territory and jurisdiction to the colony and prescribing the rules of individual right—have so perfected the titles in Maine, that we have very little reason to discuss their origin.

By a recurrence to the origin of our *political* institutions, we are struck with the singular fact that nearly all the charters which form the basis of our liberties emanated from the three first sovereigns of the House of Stuart—a family not much distinguished for their respect for popular rights.

But the founders of the republics which first constituted our Union were men of strong attachment to personal liberty, and they evinced much calculation in obtaining in their charters those grants which formed its basis. They, with much plausibility, took the *forms* of the mixed monarchy of the parent State, but *popular principles* pervaded the whole. We improved upon these charters, until we have made the COMMON LAW, pruned of its *feudal* absurdities, the palladium of our liberties. Its spirit breathes through all our institutions; and the great and essential principles of the rights of persons and property are derived from the *great charters* of English liberty.

Our government, however, is *anomalous*, bearing little or no analogy to any other, ancient or modern. When I speak of

the *Federal, National, or General* Government, or simply of the *Union or United States*, I intend the same thing; not indicating by the appellation any creed or principles of construction adopted or maintained by any school of politicians. It has been my aim to give such rules of construction of the State and National Governments, as have been adopted or established by our ablest and most illustrious statesmen, and such as, in my opinion, will, in their practical operation perpetuate our union and liberty.

The fact that the General Government is established upon and sustained by those of the States, and at the same time acts upon *the people*—a thing so paradoxical to foreigners and so little considered and understood by ourselves—is one of its most striking peculiarities. It is this principle, this seeming paradox, which I have undertaken to explain. It is, I am aware, no very easy task, as I am almost entirely without a model. No *American* has yet attempted it. M. de Tocqueville, a French gentleman, has written on the Democracy of America; and he is the only foreigner who has entertained a just conception of the relation which the citizen bears to the State and the United States. Although his work is not adapted to the understanding of general readers, as it is more *scientific* than *practical*, yet there is in it much to instruct the scholar and statesman, and to entitle this distinguished stranger to our gratitude for expounding for us the principles of our own government. But there are other grave and momentous subjects growing out of our complex relations, which no foreigner has ever reached, which are perplexing to ourselves, and on which our wisest and profoundest statesmen have entertained contrary opinions. How far the allegiance which a citizen owes to the State and United States, attaches on his emigration to another State, and what rights of citizenship he carries with him or leaves behind—the reserved rights of the States, in withholding obedience to certain acts of the General Government—the right of changing our territorial limits—the extent of the treaty-making power—the method and means of determining a contested election of President—the subject of slavery—and many others equally grave and important, are still left, perhaps to distract and divide us, but, as we hope and trust, to be determined by the same wisdom and forbearance which influenced and effected the adoption of the Federal Constitution.

That an experiment so novel and without precedent should, in its operations, experience some jarrings and conflicts, is certainly not surprising. It is matter of astonishment, rather, that

a system growing out of such opposite interests and local prejudices should, in practice, have kept in tune so well, and have so effectually preserved those rights and liberties it was intended to protect. When, by the peace of 1783, we had terminated the revolution, we found ourselves thirteen free and independent States, each claiming to be sovereign within its own dominions. We had, to be sure, entered into a solemn league and covenant for the common defence and general welfare, and had confided the exterior concerns to a Congress of the United States. The "Articles of Confederation" were as obligatory as compact or treaty could be which had no other sanction but the will of the parties, and admitted of no coercive power to enforce obedience. Each member of the compact could expound, not only the articles themselves, as its judgment or interest might dictate, but every foreign relation, even the treaty of peace which guarantied our independence, might be revised, adjudicated, and explained away by any member of the confederacy. Congress could *advise*, but it could *execute* nothing. Foreign nations could legislate upon our commerce, while we had no power to countervail or retaliate, as the smallest State might thwart and entirely defeat the general purpose. Foreigners had become our carriers, our navigation was melting away, and we were constantly incurring debts which we had no means to pay. Things were approaching a crisis, and all perceived the necessity of a *general government*. But the small States as well as the large were equally independent; each had enjoyed an equal voice in Congress, under the Confederation, and each still insisted upon its equal powers in the Government which was to be established. On the contrary, those States which might become strong and populous, could scarcely be expected to unite in a Government, unless its voice in the general counsels could be commensurate with its numerical strength. Was it to have been expected that Delaware, whose population might never exceed one hundred thousand, should hold in equal check New York with its probable five millions? Or was, on the other hand, the State of Delaware to be swallowed up in the vast population of the large States, when she was now an equal member of the thirteen?

The members of the convention who framed the Constitution were met at the threshold with this difficulty in the apportionment of the powers which were to be exercised. It was not difficult to determine *what* powers should be granted. A line of distinction was easily drawn, conferring on the General Government our exterior concerns and the relation between the States, and reserving to each State whatever regarded its

internal or municipal affairs. But the question still recurred, how, and by what relative voice are these powers to be exercised in the General Government, and how are the small States to be protected from encroachment by the popular strength wielded by the large ones? It was feared that the municipal powers reserved to the States might be encroached upon and frittered away, if they were subjected to the decision of a popular vote in the General Congress; and yet it was scarcely to be pretended that our national concerns could be safely subjected to the will of a minority which might be expressed by a *federative vote*. In the one case was seen a consolidated republic, with all its dangers of faction and corruption; in the other, a confederation of States, of equal powers but unequal strength and means—small States controlling great ones, or made the dupes of their power or the victims of their corrupting influence.

To guard against these extremes, and to protect the *States* in the exercise of the *local* powers, and the *nation* in the management of whatever concerned “the common defence and general welfare,” the Legislature was composed of two branches, each having a negative upon the other. In the one the States were to have an equal voice, and in the other there was to be a numerical representation of the people.

By this provision, as well the dictate of compromise as of profound wisdom, the balance was preserved, and conflicting interests were settled and adjusted. To provide effectually for the combination of the popular and federative influence, the electors of President and Vice-President were apportioned according to the number of Senators and Representatives, and the Judiciary was appointed by the *President and Senate*. In this last provision is seen the establishment of a tribunal by a combination of the popular and federative voices, which is ultimately to determine the line of jurisdiction between the States and General Government.

With a Constitution granting defined specific powers to a General or National Government, and reserving all else to the States, and, these means of executing the trust confided, the United States commenced their new and untried experiment, and its practical operation for half a century has proved the wisdom of its founders, and its efficacy in preserving and improving all those political and domestic rights which are essential to national prosperity and personal liberty.

The State Legislatures acting under their own Constitutions, are made constituent parts of the General Government. They provide for the election of the popular branch of the National

Legislature, by the rules prescribed by the Constitution of the United States, and *elect* the Senators. They prescribe the mode of appointing the State's *quota* of electors of President and Vice-President. And indeed, without State organization and action, the General Government would become defunct.

But, notwithstanding all this, neither the States or General Government have any action *upon each other*. A State has no power over its members of Congress, either of the House or Senate. It may request, advise, and even instruct them; but such is the hold that the United States have on them, during the period for which they are elected, that the moment they become members, their immediate constituents have no power to withdraw them. The State (as such) can do nothing to deprive the United States of its delegation in Congress, when once elected. Such, too, is the case in regard to the other Departments of Government. A President once elected, or a Judiciary once appointed, and no action of any State or of all the States can disrobe them of their authority. Their offices must continue, until they are determined by the provisions of the Constitution of the United States.

On the other hand, the General Government can do no act against a *State*, nor coerce it, or any of its functionaries, in any thing. The State and United States have concurrent (or rather *alternate*) power over the *militia*. The Governor of the State is its Commander-in-chief, and the State provides for the appointment of the officers and for training the militia according to the discipline prescribed by Congress. But Congress may provide for calling them forth to execute the laws of the Union, suppress insurrection, and repel invasion, and for governing such part of them as may be employed in the service of the United States, in which event the *President* is their Commander-in-chief.

But neither the Governor of the State nor any other officer, except those of the militia, can be subjected to the orders of the President or Congress. Should the Governor or State Legislature disobey the call of the United States for any of its militia, there is no power to *coerce* them or to *compel* obedience. Congress, aware of this, made provision by the act of 1795 for obtaining the militia of a State, by passing by the Governor and Legislature, and designating the militia-officer to detach the men required, and the forces thus detached, when mustered into the service of the United States, are, while in such service, beyond the reach of State authority.

But, if the Governor is in the field, at the head of the State troops or militia, I know of no power that can *arrange* him

with the United States army, and subject him, against his will, to its rules and orders. He must in that case, act as the chief of a distinct and independent corps, and no Court Martial of United States officers could legally try him for disobedience of orders or any other military offence. In this case, he would stand in relation to the United States army somewhat as a commander of *allied forces*, and his rank, and the position of his corps would have to be arranged by agreement. In the case, which occurred in the last war with Great Britain, however, the Governor placed himself and the forces of the State, under the command of the Major-General of the United States army. But this was a voluntary concession, and viewed by many as an act of magnanimity, induced by the exigency of the times.

Nor can Congress, by law, confer any authority or impose any duty on any civil officer or functionary of a State. This proposition, I know, impugns the acts of Congress which have conferred powers and imposed duties on the Judicial Courts of the States. But I am not alone in the opinion that these acts are all unconstitutional. As the Constitution of the United States provides for a Supreme Court, and such inferior Courts as Congress may establish, and that when these Courts are instituted the President and Senate are to appoint the Judges, the conclusion is inevitable, that any designation of *an existing State Court* to hear and determine United States causes, is taking at once the power of appointment from the President and Senate and vesting it in Congress. And this is not all,—the very Court exists at the will of the States, and the jurisdiction thus conferred, may be modified or entirely annulled by local legislation, and the Courts themselves might dispose of the cases, from motives of prejudice or caprice, without any responsibility to the power that conferred the jurisdiction and imposed the duty.

The case of officers of the militia is therefore the only exception to the rule that the functionaries of the State and of the United States are responsible only to their respective Governments, and can acquire no authority nor be subject to any duty from any other source. And this exception is expressly provided, from the necessity of the case, that when the soldiers are required for United States service, their officers become United States officers.

It is indeed a character peculiar to our governments, that both, without interfering with each other, act upon each individual member of the community, entitle him to the protection and subject him to the penalties of the laws of each, without entangling him with adverse obligations.

So long as the line of jurisdiction of the two governments is well defined and distinctly marked, the duties of the citizen can be fulfilled to both. Though the allegiance is *double*, it is not *adverse*. The General Government, instead of enforcing its edicts *upon* or *through* the States, *passes on*, reaches every individual, compels his obedience, and ensures his protection, in all subjects confided to it; and where a question of jurisdiction occurs, it determines the controversy by its own Judiciary.

The State Governments have, however, an important part to perform in this political machine. Within their proper sphere they are sovereign, but they are kept within it by a superintending power vested in the Union. A laudable and salutary jealousy is kept alive, which preserves these powers from encroachment. The people look, in the first instance, to the State, as the guardian of their domestic rights and liberties, and next, to the United States for "the common defence and general welfare" of all. It is in the service of the State that legislators and officers commence their political education. Here they learn the rudiments of making and administering the laws, and to whatever height a statesman rises in the General Government, he never forgets his State partialities. The single fact, that since the adoption of the Constitution of the United States, *the general permanent laws* of a State are as voluminous as those of the United States, is proof of the important trusts which still devolve upon the local Legislatures.

Since the adoption of the Constitution of the United States, feuds and animosities between the States are scarcely known. That restless, rival spirit, which has been the bane of other republics, and which it was predicted would prove the downfall of ours, is entirely subdued. It having been provided, that the judicial power shall extend to controversies between States, and this being the only means allowed them to settle their disputes, we are in no danger from those feuds and animosities which have agitated other rival communities.

In the following pages will be found an *outline* at least, of the principles of Legislation and Law of the State and United States. In selecting Maine as the single State, whose Constitution and Laws I would connect with those of the Union, I had no *local* views. But to simplify the subject, I deemed it best, instead of a reference to the institutions of other States, to take our own as a single example. I was the more induced to this from the fact that we have copied *Massachusetts* in all the leading provisions in our Constitution and Laws,—a State which has infused the great principles of rational liberty into most, if not all of the other States. Indeed, we shall find, in

the jurisprudence of each State, such a striking similarity that an exposition of the Legislation and Laws of one, will apply to almost every other.

The *first* book is chiefly *political*, embracing the State Government, the powers delegated to Congress, its organization, and mode of proceeding. From this I deemed it proper to exclude whatever might savor in the least of *party*, and to present those principles only in which all concur. The *second* gives a brief exposition of those *personal* rights and liberties which are essential in all free Governments; and most of which are common to all our republics. There are some, however, which are *local*, and perhaps peculiar—such as the right of *instruction*, and the claims of the *poor* upon public charity. On the subject of *education* and *pauperism*, I have therefore been compelled to be particular in giving a skeleton at least of each of our own systems. In the *third* are included the general principles of law in regard to *personal* property. On this very extensive branch of civil jurisprudence, there is very little peculiar to our own State. Some statutory provisions vary in some sort our doctrines from those of other countries, although in the main the rights to personal property in possession and in action, are nearly the same in all civilized communities. The *fourth*, on the subject of *real* estate, consists in a considerable degree of a condensation of statutory provisions. The laws of *devises*, *descents*, and *conveyances* of real estate, vary in different States of the Union, but instead of noticing the differences I have been obliged to limit myself to the rules prescribed by the Legislature of Maine. The *fifth* and concluding book, treats of the remedies for private and public injuries. The jurisdiction of State and Federal Courts, is a subject so complicated, and so necessary withal to be understood, that I have been obliged to give it more space than I intended. It is important that every one should know to what tribunal he must resort for redress of injuries, and before which he may be arraigned to answer for crimes and offences. Unfortunately, we have no well-digested *criminal* code, suited to the respective jurisdictions of the State and Federal Courts. Such a work, well arranged, and *elementary* rather than *technical*, is a great desideratum, and would be alike instructive to the statesman, the lawyer, and the citizen. Our *law martial*, however, is an exception to this deficiency, as the rules and articles of war for the *State* and *United States troops*, and for the *Navy*, properly arranged and digested, would approach very near a *criminal military code*. The military offences and the mode of trial, subjects very little understood by most

of our citizens, have been condensed and presented under their proper divisions.

As "The Statesman" is not intended exclusively for gentlemen of "the profession," I have not incumbered it with special references to authorities. At the commencement of each chapter, I have referred the reader generally to the books on which I rely. Special references would be useless to general readers, and professional gentlemen do not need them.

The perpetual changes in the statutes of the State, render it difficult to learn, not only what the law *is*, but more especially what it *will be*. I have therefore deemed it prudent to present only those laws and institutions which have acquired a character for permanency, and which may not perhaps be made, very soon, the sport of legislative experiment. The spirit of improvement should never be discouraged, but every *innovation* is not an *improvement*. This remark is peculiarly applicable to legislation, as the frequent changes in the system of laws increase the difficulty of understanding them, and create a snare rather than a protection. It is better to endure a trifling evil, than to incur the hazard of an innovation, the consequences of which cannot be foreseen. Every act of legislation is an *experiment*, and when its success has been proved, it is worth far more than any hypothesis, however plausible. To be sure, I would not, as was done in one of the ancient republics, compel the projector of a law to propose it *with a halter about his neck*, but I would caution young legislators not to innovate upon settled principles, until experience has taught them the probable consequences of their innovations.

BOOK FIRST.

GOVERNMENT.

GOVERNMENT is the power of making and administering the laws for the community.

It is essential to a free Government, that the laws should be equal—that each individual should be entitled to their protection, and subject to their authority.

They should be as binding on the makers and administrators themselves, as upon the rest of the community.

A *constitution* is the rule by which the makers and administrators of the laws are to be governed.

They cannot abolish, change or modify it. Could they make, alter or abolish their own rules, they might confer on themselves what powers they chose to assume. A constitution, being the law of the government, must be consequently beyond its control.

But although the constitution is the supreme law, and unalterable but by a power resting in the whole community, and usually to be exercised in the manner prescribed by the constitution itself, still there must be a power vested *somewhere*, in some tribunal, to expound and interpret this constitution, and apply it to cases which may arise.

To vest it in the Legislature is giving them unlimited legis-

lation. To vest it in the Executive, is to authorize him to make and unmake laws at his will.

A Judiciary, therefore, properly constituted, must be the only safe depositary of this delicate and important trust.

It is not that the constitution would be entirely safe here, but that it would be safer than elsewhere.

To this end, however, this Judiciary should be—1st, Without patronage—2d, Independent of the Executive—3d, Learned and intelligent—4th, Subject to punishment for tyranny or corruption—5th, That the tribunal to try its members should be constituted *by the constitution itself*.

But, after all, a constant vigilance in the people is indispensable, lest one misinterpretation or usurpation should be made an apology for another, until the constitution is perverted from its original design, and made to *oppress*, where it was intended to *protect*.

PART I.

STATE GOVERNMENT.

MASSACHUSETTS, from which Maine was taken, was one of the original thirteen, which declared and achieved our independence. Her institutions bear a close resemblance to our own. Indeed, much of our constitution and many of our laws are borrowed from the parent State.

The States, on becoming independent of Great Britain, have been denominated "sovereign." This is a term, as applied to all States, and especially to ours, which is quite indefinite, and much more so since the adoption of the Federal Constitution. Indeed, if sovereignty means supreme, absolute power, it would be difficult to determine in what department of the State it was deposited. The Declaration of Independence announces the States as "free and independent," but says nothing of their *sovereignty*. *Sovereignty is the power to command in the last resort*; and if we take this definition as a test, there is, perhaps, no civilized nation on earth that is in every thing and at all times sovereign. Compounded, as our own governments are, of State and Federal, this sovereignty is necessarily limited; and yet, on subjects within their proper spheres, each may be sovereign—that is, each has the power to command in the last resort. The State may vest this power in whatever department it chooses, so long as it is retained and

is not restrained or controlled by exterior power. But the people of each State in this Union have delegated a portion of this power to the United States, and where it is thus delegated, it either is qualified, or ceases altogether, in the State. Wherever the Government is restricted by the Constitution in the exercise of its functions, its sovereignty is limited. In full accordance with this view, the Supreme Court of Maine have determined that *an office* is a grant of a portion of the sovereign power ; and though it may be said that this sovereignty, in the last resort, rests in the people, still, if the delegations of power have been such that they cannot be resumed without a destruction of the Government itself, this sovereignty must return to the people, *individually*, and not as members of an organized community. Such a *sovereignty* in the people, therefore, goes behind all government, and reduces men to a state of nature. To avoid such a state of things, we have provided a mode of amendment, so that the Constitution may be altered or changed, without a dissolution of the Government.

CHAPTER FIRST.*

ORIGIN OF THE STATE GOVERNMENT.

SECTION I.—MASSACHUSETTS.

The Government of Massachusetts did not spring out of the revolution. The people of that colony were not obliged to begin anew, when they separated from the parent State. The charter of William and Mary, which embraced Maine, in its whole extent, had given them all the outlines of the State Government—legislative, executive, and judicial powers, the organization of towns and counties, the right of election and qualification of electors, and the trial by jury. Under that

* Constitution Mass. Constitution Maine.

charter the colony had ordained and established many salutary institutions ; Colleges and other seminaries of learning had been founded, and considerable progress had been made in primary schools. The rule of primogeniture had been abolished, and provision had been made to bar entailments by a simple and easy process. Without a recognition of these great principles, and especially without the institution of *towns* and town organization and police, the task of forming a State Government would not have been so easily accomplished. To abolish the power of the Crown, or rather transfer it to an Executive of their own, with modifications, and leave the rest almost as it was, for more auspicious times, seemed to be all that the exigencies of the case required.

SECTION II.—MAINE.

The Constitution of Maine was borrowed chiefly from that of Massachusetts. Though built upon its basis, the superstructure is unquestionably improved. Religious liberty is better protected ; education is put under the *protection* and *control* of the State ; and, indeed, the whole bill of rights prefixed to and made a part of the Constitution, is more definite, comprehensive and safe. The frame of government is, in many respects, improved. The limitation of the number of the House of Representatives, to a *minimum* of one hundred and fifty and a *maximum* of two hundred—the dispensing with the office of Lieutenant Governor, and with a property qualification for electors and elected—are among the improvements.

By the Constitution of Massachusetts, it was provided that “all the laws which have been heretofore adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practised in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature ; such parts only excepted as are repugnant to the rights and liberties contained in this Constitution.”

And the Constitution of Maine has also provided that "all laws now in force in this State, and not repugnant to this Constitution, shall remain and be in force until altered or repealed by the Legislature, or shall expire by their own limitation."

CHAPTER SECOND.*

SECTION I.—ELECTIONS.

Elections are made by male citizens exclusively, of twenty-one years and upwards, without regard to colour. They are to be by *ballot*, written or printed, bearing the name or names of the person or persons voted for, but not the name of the elector, nor any other distinguishing mark or note.

Residence established for the three next preceding months gives a right to vote in the town or plantation where the elector's residence is so established. But persons in the military or naval service, stationed in garrisons, barracks or military places, and students at any literary seminary, gain no such residence as qualifies them as electors.

SECTION II.—TOWNS.

A *Town* is an organized portion of the inhabitants of the State, within defined limits of territory, which must be within the same County. The inhabitants are a body politic and corporate, and, when lawfully notified, may, at their meetings,

* Constitution Maine. Decisions Sup. J. Court.

vote all necessary taxes for maintenance and support of schools, and the poor, for the construction and repair of highways, and other necessary charges.

As corporations, they choose their moderator, clerk, selectmen, assessors, overseers of the poor, and other officers, and may sue and be sued in their corporate capacity. The selectmen are the presiding officers of all elections for *the State or United States*.

A *Plantation* liable to taxation by the State, has privileges similar to Towns in the choice of officers; and its organization, its duties in regard to the assessment and collection of taxes, and support of the poor, schools, and the making and repairing highways, are the same. The *assessors* perform all the offices in plantations which selectmen perform in towns, and preside, like them, in all elections for the State and United States.

The qualifications of voters in *town or plantation* affairs are the same as for Governor, Senators and Representatives.

Towns are also parishes, or parochial corporations, and as such may raise money for the support of the ministry. But such are the provisions for establishing and incorporating religious societies of different denominations, that few towns, as such, act as *religious* corporations.

SECTION III.—PRIVILEGES OF ELECTORS.

Electors are privileged from arrest on the days of election, during their attendance at, going to and returning from, the place of meeting—except for treason, felony, or breach of the peace.

They are not obliged to do military duty on election days, except in time of war or public danger.

In cases of arrest, not within the exceptions, the arrest is void, and the officer or person making it is a trespasser.

Elections are determined by a *majority*—that is, by more than one half the votes given.

The Constitution and laws scrupulously guard the right of election. Giving or receiving a bribe, as a reward for procuring or to procure any office or place of trust, is punishable by fine and perpetual disqualification for holding any office or place of trust within the State. And if any person, by bribery, menace, or other corrupt means, shall attempt to influence, disturb or hinder any elector in the free exercise of the right of suffrage, it is declared to be a high misdemeanor, and punishable by fine or imprisonment. Whether it is that these salutary provisions are disregarded, or are inadequate, it is much to be feared that electors are too often moved by other influence than their own deliberate and independent judgment.

Whatever of sovereign power is vested in the Government of the State or of the United States, it reverts to the electors on the days of election, and an invasion of this sovereignty is indeed a high crime and misdemeanor. Every elector should go to the polls untrammelled—uninfluenced by the hope of reward or fear of punishment.

CHAPTER THIRD.*

SECTION I—LEGISLATIVE POWER.

This, by the Constitution of Maine, is vested in a Senate and House of Representatives, each having a negative upon the other.

The powers granted are, “to make and establish all reasonable laws and regulations for the defence and benefit of the

* Laws of Maine. Const. and Laws of Maine. Rules of Senate and House of Representatives. Jefferson's Manual.

people of this State, not repugnant to this Constitution, nor to that of the United States."

Each House is the judge of the elections and qualifications of its own members.

They are made by the Constitution the *exclusive* judges, and though they have (with what propriety I will not say,) asked the opinions of the Justices of the Supreme Judicial Court, in regard to "questions of privilege," such opinions should have no binding force on the House asking them, and much less on any future House.

A majority of each House constitutes a quorum, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as it may provide.

If, at any time, a less number than a quorum is present, the Sergeant-at-Arms, or other executive officer of the House, is sent for the absent members, and unless each absentee shall render a sufficient excuse, he incurs the expense of the process of bringing him in.

Each House may determine the rules of its proceedings. It may punish its members for disorderly behavior, and, with the concurrence of two thirds, may expel a member.

It may also punish by imprisonment, for a period not beyond the session, any person not a member, for disrespectful or disorderly behavior in its presence, for obstructing any of its proceedings, or threatening, assaulting, or abusing any of its members, for any thing said or done in either House.

The preliminary proceedings in the Legislature of Maine are chiefly by *Joint Committees*. The Joint Standing Committees usually consist of seven on the part of the House, and three on the part of the Senate. The chairman on the part of the Senate presides in committee, and a majority of members decides on the report.

The bill or other measure is usually reported in the Senate by the chairman; but it may, at the discretion of the committee, be reported in either House, by some member designated for the purpose.

The Joint Standing Committees are—

On the JUDICIARY,	CANALS AND RAILROADS,
LITERARY INSTITUTIONS,	INTERIOR WATERS,
BANKS,	MILITIA,
INCORPORATION OF TOWNS,	AGRICULTURE,
DIVISION OF TOWNS,	MANUFACTURES,
DIVISION OF COUNTIES,	ACCOUNTS,
STATE LANDS,	PARISHES,
STATE ROADS,	CLAIMS,
STATE PRISON,	PUBLIC BUILDINGS,
ROADS AND BRIDGES,	INTERIOR FISHERIES,
MILITARY PENSIONS.	

The rules of proceeding, through all the process of legislation, which are observed in Congress or the State, will be condensed and presented in one view, in Part III, Chap. I, noticing what is peculiar in each House in both Legislatures.

SECTION II. — SENATE.

The Senate is to consist of not less than twenty nor more than thirty-one members, to be increased from the *minimum* to the *maximum*, according to the increase of the House of Representatives.

They are to be chosen for one year, in districts formed by the Legislature in every ten years.

The apportionment shall be according to population.

They must be twenty-five years of age, have been five years citizens of the United States, and residents one year in the State at the commencement of their term, and three months in the district which they represent at the time of election.

It would seem that they become disqualified by removing from the district.

The meetings for the elections of Senators are on the second Monday of September, annually. The notice must have been given, by the *selectmen* of towns or the *assessors* of plantations, seven days previous.

These officers are to preside at the meetings, impartially ; receive the ballots of the electors ; sort, count, and declare them in open meeting, and in the presence of the clerk, who is to form a list of the persons, and number of votes for each, and make a fair record of them in the presence of the selectmen, (or assessors,) and in open meeting. Copies of these lists, attested by the selectmen (or assessors) and clerk, are to be sealed up in open meeting, and the clerks are to cause them to be delivered into the office of the Secretary of State, thirty days before the first Wednesday of January.

Other qualified voters, living in unincorporated places, may vote in an adjacent town, if assessed for taxes in such town, and are to be notified accordingly.

Upon an examination of these lists, by the Governor and Council, those having a majority of votes in each district, shall, twenty days previous to the first Wednesday of January, be notified of their election.

The Senators, so notified, shall, on the first Wednesday of January, determine who are elected, and if there are any vacancies, for defect of majorities, the two Houses are to fill them, in each district from twice the number of the Senators required, from the highest *numbers* on the lists—that is—

If one Senator is required from any district, and *one* candidate stands highest, and the *two* next are equal, the election must be made from the *three*, they having but two *numbers*.

The Senate chooses its President and other officers.

It has the sole power of trying impeachments, and when sitting for that purpose, the members are to be on oath or affirmation. Two thirds of the members present are necessary to convict, and a majority is necessary to constitute a court of impeachment. Judgment is, however, to extend no further than removal from office and disqualification.

This disqualification, it would seem, may be *temporary* or *perpetual*, but is no bar to indictment, trial and judgment according to law.

The proceedings in impeachment will be given fully in treating of the Senate of the United States.

In case of vacancy of the office of Governor, the President of the Senate is to officiate, and during the time a President *pro tempore* must be appointed. But as soon as the vacancy of Governor is filled, the President resumes the chair in the Senate.

If there should be less than a quorum of Senators elected, these, with the House of Representatives, must fill the vacancies.

SECTION III.—HOUSE OF REPRESENTATIVES.

This branch of the Legislature is to consist of not less than *one hundred and fifty*, nor more than *two hundred*.

The members are elected for one year from the day next preceding the annual meeting of the Legislature.

An apportionment is to be made once in ten years at most, and five at least, of the Representatives, equally, or near as may be, among the counties, according to *population*, exclusive of foreigners not naturalized and Indians not taxed. Each town having

1,500 inhabitants	is entitled to one Representative,
3,750	“ “ to two “
6,750	“ “ to three “
10,500	“ “ to four “
15,000	“ “ to five “
20,250	“ “ to six “
26,250	“ “ to seven “

which last is the maximum to which any town can ever be entitled. Towns and plantations of less than 1,500 may be *classed*, or formed into a representative district, and, when they prefer it, shall be allowed alternate or successive representation, according to their relative population.

When the standard of 1,500 is too high or too low to give the number required under this arrangement, it may be altered.

The meetings for the choice of Representatives shall be at the same time, and called and regulated in the same manner,

as for Senators, save that the lists, or certificates of election, shall be delivered to the Representatives within ten days after the election; and the selectmen and assessors of the *classed* towns and plantations shall meet in four days, to compare the votes, and if any one is elected they shall deliver certified copies of the lists to such person, and if not they shall call another meeting and proceed in the same way, and so on in case of every failure.

When any town entitled to elect one or more, shall fail to complete the election on the day prescribed by the Constitution, the meeting may be adjourned for a week, and so on from week to week, until the election shall be completed.

When vacancies happen by death, resignation, or otherwise, they are to be filled by new elections.

The House of Representatives shall choose their Speaker and other officers.

Elections are by *majorities*, except in the case of committees.

The House of Representatives has the sole power of impeachment.

At the commencement of the political year, *to wit*, on the first Wednesday of January, some member calls the members to order, and nominates a chairman, who is elected as matter of course, and the certificates or lists of votes are delivered in at the table, and a committee is appointed, who make a report upon inspection of the returns, and upon this preliminary report the Governor and Council *of the last year* appear upon notice, in the Representatives' Hall, and the oaths are administered by the Governor to those who *appear* to be elected.

As soon as a quorum is thus qualified, they proceed to elect, by ballot, their Speaker. If the committee, appointed for the purpose, report a majority of votes for any one member, he is declared by the chairman elected, and is conducted to the chair, where, if he accepts, he takes the oath, and makes his acknowledgements to the House by an appropriate address. The House then proceed to the choice of a Clerk, and this officer being elected and sworn, the House is said to be organ-

ized, and ready to proceed to business, of which they, by message, notify the Senate.

Similar proceedings being had in the Senate, and a message communicating the fact of organization being interchanged, a Joint Committee is appointed to report on the Governor's election. The Committee proceed immediately, and the next day, perhaps, the report is made; and if there appears to be an election by a majority of all the votes legally returned, the Governor elect is notified, and if he accepts, he appears and takes the oath of office in the presence of the two Houses.

Besides the rules and orders which are common to most other legislative bodies, and which will be noticed hereafter, there are some peculiar to this House of Representatives. The House is divided into, say, six divisions, and a *monitor* is appointed by the Speaker for each division, whose duty it is to see to the due observance of the orders of the House, and to return the members and number of votes in his division. In counting the numbers to determine a vote, the ayes first rise and are counted, and then the noes. The Speaker receives the numbers in each case from the annunciation of the monitor in each division, adds them up, and declares the vote to the House. But at the request of one fifth of the members present, any vote may be taken by yeas and nays, which must be entered on the Journal.

Most of Committees in the Legislature of Maine are Joint. The Standing Committees which are of the House exclusively, are those on

ELECTIONS,	BILLS IN THE THIRD READING,
ENGROSSED BILLS,	LEAVE OF ABSENCE,
FINANCE,	THE PAY ROLL,
COUNTY ESTIMATES,	CHANGE OF NAMES.

All to consist of seven members, except the last, which consists of three.

CHAPTER FOURTH.*

SECTION I.—EXECUTIVE POWER.

This is vested in a Governor, who is elected in the same time and manner, and by the same electors, as Senators and Representatives, and for one year from the first Wednesday in January.

If no person have a majority of the votes, the House of Representatives, from the *four* highest numbers on the lists, select *two*, from which the Senate selects *one* who shall be the Governor.

His qualifications are, thirty years of age, a natural born citizen of the United States, five years residence in the State, and a resident there at the time of his election, and during the time for which he is elected.

He can hold no other office.

His compensation shall not be altered during his term.

He is Commander-in-chief of the Army, Navy, and Militia, except when the latter are in the actual service of the United States. But he cannot march or convey any citizen out of the State, without his consent or that of the Legislature, except it shall become necessary to march or transport him from one part of the State to another, for its defence.

He shall nominate, and with the advice and consent of Council, appoint all judicial officers, the Attorney General, Sheriffs, Coroners, Registers of Probate and Notaries Public, and all other civil and military officers, whose appointment is not otherwise provided for.

Nominations must be made seven days at least before the appointments.

The Governor shall, from time to time, give the Legislature

* Constitution and Laws of Maine.

information of the condition of the State, and recommend such measures to their consideration as he may judge expedient.

He may, with the advice and consent of Council, grant reprieves and pardons, except in cases of impeachment.

He may require of executive officers, civil or military, information upon any subject relating to the duties of their offices.

He shall take care that the laws be faithfully executed.

He may on extraordinary occasions convene the Legislature.

In case of disagreement between the two Houses, he may adjourn them, but not to a time beyond the next annual meeting.

If, since the last adjournment, the place shall have become dangerous, from sickness or enemies, he may convene the Legislature to meet in some other convenient place in the State.

In case of vacancy, the office devolves upon the President of the Senate, and in case of his vacancy, on the Speaker of the House, and where both of these offices are vacant, the Secretary of State shall convene the Senate to choose a President, who shall, *ex officio*, be the Governor.

SECTION II.—EXECUTIVE COUNCIL.

This Council consists of seven, citizens of the United States and residents of this State. Their duty is to advise the Governor in the Executive part of Government.

The Governor may assemble them at discretion, and he and a majority of them may hold a Council for ordering and directing the affairs of the State according to law.

The Councillors are elected annually by the Legislature, at the commencement of their session, by the two Houses in convention. Not more than one Councillor is to be chosen from any one Senatorial district.

The Councillors are privileged from arrest, as Senators and Representatives.

Their proceedings must be recorded in a Register, and

signed by the members agreeing thereto, in which each Councillor may enter his dissent.

This Register may be called for by either House.

No member of Congress or of the State Legislature, nor person holding any office under the United States, post offices excepted, nor any civil office under the State—shall be Councillor.

No Councillor shall be appointed to any office, during the term for which he is elected.

SECTION III.—SECRETARY OF STATE.

This officer is elected annually, by the two branches of the Legislature in convention. His duties are, to keep the records; to attend the Governor and Council when required, to have the custody of all the records of each department, and, when required, lay them before either branch of the Legislature; and do all other acts required by the Constitution and laws. He has power to appoint his deputy and clerks.

SECTION IV.—TREASURER.

This officer is chosen annually, as the Secretary, but is ineligible more than five years in succession.

He is to give bonds, with sureties, at the discretion of the Legislature, for the faithful execution of his trust.

He is not to engage in any business of trade or commerce, nor as a broker, nor as agent or factor for any merchant or trader.

No money is to be drawn from the Treasury but by warrant from the Governor and Council, and in consequence of appropriations made by law.

And a regular statement of receipts and expenditures is to be published at the commencement of each session.

When it shall be made to appear to the Governor and Council, on the complaint or suggestion, under oath, of any surety, that the Treasurer is insane, insolvent, has absconded or concealed himself from his creditors, or is absent from the State or his duties, to the hazard of the State, they may declare the office vacant ; and in case of such vacancy, or one by death, resignation or otherwise, the Governor and Council may appoint a Commissioner of the Treasury, who is to be under like responsibilities as the Treasurer ; and the Secretary of State and Attorney General, or two discreet persons, to be appointed by the Governor, shall take an inventory of all the money, notes, bonds, books and other property, giving notice to the Ex-Treasurer or his sureties.

The clerks or other persons employed by the Treasurer are punishable for fraud or embezzlement, by fine not exceeding two thousand dollars, or confinement to hard labor for years or for life.

CHAPTER FIFTH.*

JUDICIARY.

SECTION I.—SUPREME JUDICIAL COURT.

The Judicial power is vested in a Supreme Judicial Court and such other Courts as the Legislature shall, from time to time, establish. The compensation of the Justices of this

* Constitution and Laws of Maine.

Court is not to be increased or diminished during their continuance in office. But they are to receive no other fee or reward, and hold no other office, except that of Justice of the Peace.

They shall give their opinion upon important questions of law, and on solemn occasions, when required by the Governor, Council, Senate or House of Representatives.

By a late amendment of the Constitution, these Judges, and other judicial officers, hold their offices for the term of *seven years*.

This Court has original and exclusive jurisdiction in cases brought on probate bonds, in the name of the Judge of Probate—in all cases of divorce and alimony—and in all cases of *equity*, except certain chancery powers in regard to penalties, conferred on the State District Court.

It has jurisdiction, original, and concurrent with the State District Court, in real actions, trespass *quare clausum fregit* (for breaking and entering a close,) replevin, and actions against towns, and other personal actions where more than two hundred dollars is demanded, where if less than that sum is recovered the plaintiff *may* not be entitled to costs. It has appellate jurisdiction in all other civil cases.

It is the highest criminal Court. It has original, exclusive and final jurisdiction of cases *capital*—viz. treason, murder, and arson of a dwelling-house in the night. These are the only offences punishable with death ; and as to the first, it may be questioned whether, since the adoption of the Federal Constitution, there can be treason against the State which is not so against the United States.

It has also the same jurisdiction of the crimes not capital—of misprison of treason (perhaps,) arson of a dwelling-house in the day time, burglary, robbery, rape, forgery, counterfeiting, manslaughter, felonious assaults, attempts to commit murder by poisoning, duelling, burning in the day time, perjury and subornation, adultery, bigamy, polygamy, and sodomy.

This Court is a Court of final appellate jurisdiction in all questions of law arising in civil and criminal suits or prosecu-

tions, whether arising before the State District Courts, Courts of Probate, Municipal or City Courts, or Justices of the Peace.

The cases, whether civil or criminal, are taken alike from the State District Courts, by exceptions taken to the opinion of the Judge at the trial, and by him allowed.

Writs of Error lie also to this Court, in civil suits, and *certiorari* in criminal prosecutions, and other cases where the proceedings are not according to the course of the common law.

It has appellate and final jurisdiction in all cases, from all Courts, in matters of law, whether civil or criminal. But no appeal, by exceptions or otherwise, is allowed to *the State* in any criminal suit. Should a Court of inferior jurisdiction rule erroneously *in favor* of the accused, the error cannot be corrected by any other judicial Court.

It has appellate jurisdiction from the Courts of Probate in all cases, and further jurisdiction, exclusive or concurrent, original or appellate, given by particular laws.

SECTION II.—STATE DISTRICT COURT.

This Court has hitherto consisted of three Justices, but now of four, each of whom constitutes a Court; but they have no associated powers.

It has original and final jurisdiction, concurrent with the Supreme Court, in all civil suits in real actions, trespass *quare clausum*, replevin, against towns, and personal actions above two hundred dollars, and exclusive jurisdiction in all other civil actions, except in matters of law, where appeals may be had to the Supreme Court by exceptions taken to the opinion or decision of the Judge, or by writ of error.

It has original, exclusive and final jurisdiction in all criminal cases not cognizable by the Supreme Court, except of small offences cognizable by Justices of the Peace, in which it has

appellate and final jurisdiction, and except in matters of law, in which the Supreme Court has appellate jurisdiction.

In criminal cases, the accused who files exceptions to the direction or decision of the Judge, must enter into recognizance, with sureties, to prosecute his appeal in the Supreme Court; and in case he fails, or his exceptions are overruled, the Supreme Court may render such judgment as the State District Court might have rendered.

It has appellate jurisdiction in all civil cases cognizable by Justices of the Peace.

These are the *present* relative powers of this and the Supreme Judicial Court. But such have been the perpetual changes of the State Judiciary, that it has little or no stability, and its character is consequently rapidly depreciating. If the system could be made even *tolerable*, and *let alone*, it might in time be restored to what it was, and even to what it should be.

SECTION III.—JUSTICES OF THE PEACE.

Their offices are *judicial* or *ministerial*. As judicial officers, their jurisdiction is both civil and criminal.

They may commit for trial and without bail, persons charged with capital offences, “where the proof is evident or presumption great.” They may hold to bail for all other offences, where the charge is made on oath, and the offence definitely set forth; and when a person, against whom a warrant is issued, escapes out of the County, the Sheriff or Deputy may pursue and take him in any other County. They may try offences of assault and battery, which are not of a high and aggravated nature, and punish by fine not exceeding five dollars—and larcenies of the same amount.

Their criminal jurisdiction extends to trespasses done to real estate in certain cases, sabbath breaking, profane swearing, &c.

They may require sureties of the peace of dangerous or disorderly persons. Their ministerial powers are indeed too numerous and too much in detail for the limits of this work.

They have cognizance of civil suits, where the matter in controversy or damage demanded does not exceed twenty dollars—except where the title to real estate is brought in question by the defendant's plea, in which case the defendant may transfer the case to the State District Court, recognizing to prosecute as in other cases of appeal.

Justices of the Peace and of the Quorum have judicial powers in certain cases, either jointly or separately—as for instance—Two may inquire *by jury* into cases of *nuisance*, and of *forcible entry and detainer*.

Two may discharge from prison insane persons and commit them to the custody of their friends—may inquire and determine where banns of matrimony are forbidden—may send lunatics to the house of correction, and may admit to bail persons committed for bailable offences.

Two Justices of the Peace may administer the poor debtor's oath, and discharge the prisoner from custody.

SECTION IV.—COURTS OF PROBATE.

These consist of a Judge, whose jurisdiction is limited to the County—and in some instances, where the territory is extensive, the County is divided, and constitutes two probate districts.

The Judge's powers extend to the probate of wills, and granting administration of estates of persons deceased, being inhabitants or resident in his County, or probate district, at the time of their decease, or dying out of the State and leaving estate within the County—to the appointment of guardians to minors and others—and to the examining and allowing accounts of executors, administrators, and guardians; and to all other

matters, under the authority of particular laws, in relation to estates of deceased persons, whether testate or intestate.

Incident to these powers, the Judges are authorized to issue all proper process, to command their execution from Sheriffs and other officers, and to punish for contempts.

To this Court there is a Register, who holds his office during the pleasure of the Governor and Council, but not beyond the term of four years. Appeals lie from the decrees or decisions of the Courts of Probate to the Supreme Judicial Court.

CHAPTER SIXTH.*

MILITARY POWER.

Though the Governor is made, by the Constitution, the Commander-in-chief of the Army and Navy of the State, and of its Militia, except when in the service of the United States, still these powers are much restricted by the Constitution and laws of the United States.

No State can, without the consent of Congress, "keep troops or ships of war in time of peace," nor "engage in war unless actually invaded, or in such imminent danger of invasion as will not admit of delay."

Congress has power, too, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions,—to provide for organizing, arming, and disciplining them, and for governing such part of them as may be employed in the service of the United States.

* Constitution and Laws of Maine and United States. Rules and Articles of War.

SECTION I.—POWER OF THE STATE OVER THE MILITIA.

The State has the reserved right to appoint the officers, and to train the militia according to the discipline prescribed by Congress—if this last is not rather a burden than a right. It will be seen, therefore, that the State's efficient power over the militia is not, for any practical purpose, very great, nor is it necessary that it should be. The exigency which requires this call for the militia, is to be determined by the President of the United States, except the danger is so imminent as to require the immediate action of the State authority.

When the militia are thus called into this service, the United States officer, of equal grade, will be entitled to command. But it is not certain that a United States officer of inferior grade, can command his superior in the militia, especially if this inferior officer has few or no United States troops to command. But be this as it may, as a State Army, Navy, or Militia, called out on any exigency, would soon become burdensome to the State, it would eventually be transferred to the United States, to be *commanded* and *supported* by them.

SECTION II.—ORGANIZATION OF THE MILITIA.

The Militia of the State are organized into divisions, brigades, regiments, battalions, and companies.

The Major Generals of divisions, are elected by the concurrent votes of the two Houses of the Legislature; the Brigadier Generals, by the field-officers of their brigades; the field-officers of regiments, by the Captains and subalterns; and these last, by the members of their companies.

The Aids of the Commander-in-chief are appointed by him, with the rank of Lieutenant Colonels.

The Adjutant and Quarter Masters General are appointed by the Governor and Council, with the rank of Brigadiers General.

The divisions, brigades, and regiments, are *numbered*, and take rank accordingly; and the commanding officers of each appoint their Staffs respectively.

To each division, is a Major General, a Division Inspector with the rank of Lieutenant Colonel, and two Aids-de-camp and a Quarter Master, to rank as Majors.

To each brigade, a Brigadier General, a Brigade Inspector, to serve as Brigade Major, and to rank as Major, two Aids-de-camp and a Quarter Master, to rank as Captains.

To each regiment, a Colonel, Lieutenant Colonel, and Major, with an Adjutant, Paymaster, and Quarter Master, to rank as Lieutenants; and to each regiment, a Surgeon, Surgeon's Mate, Sergeant Major, Drum Major, and Fife Major.

Adjutants and Quarter Masters of battalions of artillery and cavalry, rank also as Lieutenants.

To each company, are a captain, lieutenant, ensign, four sergeants, four corporals, a drummer, and fifer, or bugler.

So far as it can be done with convenience, each brigade is to consist of four regiments, each regiment of two battalions, each battalion of five companies, and each company of sixty-four privates.

To each battalion there shall be one company of grenadiers, light infantry, or riflemen.

To each company of cavalry, there is one captain, two lieutenants, one cornet, four sergeants, four corporals, a saddler, farrier, and trumpeter.

It is made the duty of the Adjutant General of the State, to make annual returns of the militia to the United States War Department. In this way, the President has the means of calling for the militia to execute the laws of the Union, suppress insurrection, and repel invasion. Should the State refuse the requisition for any of these purposes, the President can designate the corps, and issue his order to the proper officer, without consulting the State authorities.

SECTION III.—DISCIPLINE.

Able-bodied persons of the age of eighteen and under forty-five, are obliged to perform military duty, unless included in the exempts.

The officers and soldiers are not subject to arrest, in civil suits, when on duty, and their arms and uniform are exempt from attachment. They are not obliged to perform military duty on election days, and no officer is allowed to parade his soldiers on such days, except in case of invasion made or threatened.

The officers and soldiers to be properly armed and equipped, and officers on duty to wear their uniforms.

The discipline and field exercises to be the same as in the army of the United States.

The Governor and Council to organize and arrange the militia, according to the laws of the United States.

The militia laws are very much in detail, and have been the perpetual sport of legislative experiment. The duties of the officers and soldiers are in general well defined, and punishments are prescribed for delinquencies.

SECTION IV.—ARTICLES OF WAR.

The rules and articles for governing the troops stationed in forts and garrisons within the State, and also the militia when in actual service, are chiefly copied from those of the army of the United States, but differ in the severity of the punishments—the punishment of *death* being in no case *absolute*.

The offences punishable *with death*, or *such other punishment as a Court Martial may inflict*, are the following—

1st. Non-commissioned officers or soldiers for *desertion*.

2d. Officers or soldiers abandoning their posts, or inducing others to do so, in time of engagement.

3d. Any person belonging to the forces in service, who shall make known the watch-word, or give the parole or watch-word different from what he received.

4th. Officers or soldiers compelling the commander of a garrison, fortress, or fort, to give it up to the enemy, or abandon it.

No person to suffer death except in the cases mentioned in the articles, nor without a concurrence of *two thirds* of the members of the Court, nor until the sentence is approved by the Commander-in-chief.

For the next grade of offences *the officer* is to be *cashiered*, but in most cases the punishment is at the discretion of a Court Martial; their discretion, however, is to be exercised according to *military usage*. This leaving so much to discretion, is an objection to the military code. The officers who try the prisoner, are not always free from the prejudices which beset and infect other men, and it may happen that *interest*, as well as passion, may influence the decision.

An abstract of the rules and articles of war, for the government of the army of the United States, is given under the proper title; and the crimes and offences are defined so nearly alike, that to insert those for the government of the State troops and militia, would be mere repetition.

PART II.

THE UNITED STATES.

THE State Governments are the basis of that of the United States. Without them, the Union could not exist a single day. The Representatives in Congress are chosen by the electors of the most numerous branch of the State Legislatures. So of the electors of President and Vice President. To determine the qualifications of electors, therefore, we must resort to the Constitution and Laws of the State. The Senators in Congress, also, are elected by the State Legislatures themselves; and as the Judiciary of the Union emanates from the legislative and executive powers, it consequently follows, that, should the States suspend action, the Union is dissolved.

But though the States, by suspending their own functions, may suspend also those of the Union, yet the United States Government, when organized, does not act upon or through the States, as such, but directly upon *the people*. For the General Government to act upon the States, as political communities, it must do it by *advice* or *coercion*. Now as *advice* may be lawfully disregarded, and as *coercion* would often lead to collisions, and perhaps to war, it became necessary that the General Government should exert its energies, like other Governments, upon the *governed*. By the articles of confederation, the action of the United States was upon the States, and

by advice or recommendation only, without the power of coercion, and therefore inefficient, as each State might stop the action of the Confederacy. To provide against this state of things, the Constitution was adopted. It is a Constitution of *Government*, which, *of itself, and by force of the term, implies the power to execute its own decrees*. Its authority reaches the whole people, in spite of the States, in all matters confided to it. In its action in these matters, the United States Government is sovereign, subject to no State control, and where a conflict arises as to their respective powers, the decision of the United States must of necessity be final and conclusive.

Its direct action on the people is its peculiarity, and distinguishes it from all *confederacies*. To act efficiently, and at the same time to preserve the liberty and rights of the citizens and the States, it must act by means of legislative, judicial, and executive powers—that is, it must make laws, judge them, and execute them *upon the citizen*. And it must pursue its action upon him, until the end is accomplished. It is neither a confederacy, nor a simple republic. So far as its specified powers extend, it is *national*; so far as the powers of the States are retained, and they have a voice and action in the government, it is *federative*. No government which has ever existed, is like it, or bears to it any very close analogy; and all reasoning as to its tendency or final issue, is mere hypothesis. The equal voice of *the States* in the Senate of the United States, is intended and operates as an effectual check upon the popular voice in the House of Representatives; and where this fails to secure the State in its rights, the United States Judiciary is the umpire, or ultimate tribunal, on which each is to depend for protection in the legitimate exercise of their respective trusts.

When we speak of the *sovereignty* of this Government, we intend it in its limited sense—as a Government of defined powers. The object of its formation was to protect the people of the States from external aggression and internal contention—from foes without and foes within. All our exterior relations with the controversies of the States, were confided to the

General Government. The interior police, or municipal affairs of each State, was left to its own management.

CHAPTER FIRST.*

TAXATION.

To levy taxes is an attribute of sovereignty; and perhaps there is no power of the State and United States which is so involved and intermixed, as that of taxation.

Taxation has been defined "the transfer of a portion of the national products from the hands of individuals to those of the Government, for the purpose of meeting the public consumption or expenditure." That (as has been contended) "the moment the value is parted with by the tax-payer it is positively lost to him," and "the moment it is consumed by the Government or its agents, it is lost to all the world, and never reverts to or exists in society," is only true on the hypothesis that the *guardian population* is wholly unproductive, or upon the assumption that government *squanders* whatever the people pay. Taxes, whether State or National, are raised, assessed and collected *for the purpose* of securing the citizen in his person and property. If these taxes are laid fairly and expended economically, he gains a full equivalent in the protection which his Government affords him. But it is true, no doubt, that oppressive taxes to sustain prodigality and tyranny, are the most pernicious and unproductive of all consumptions of the products of industry.

* Const. and Laws State and U. S. Story's Com. Kent's Com. Smith's Wealth. Say's Polit Econ. Ed. Enc.

Taxes which are raised on *necessaries*, should be equal; on *luxuries*, they may be *unequal*—as these last have no tendency to raise the price of any other commodities, except of those that are taxed. They are finally paid by the consumer, without any retribution. “Under necessities,” says Adam Smith, “I comprehend not only those things which nature, but those things which the established rules of decency have rendered necessary to the lowest rank of people. All other things, I call luxuries.” Thus, tea, coffee, and sugar, have *become* necessities. Tobacco and ardent spirit are luxuries, and no rational statesman would insist that all these should be equally taxed. The National and State taxes which a citizen of Maine has to pay, are—1st, those on *the polls*; 2d, on *property*; 3d, on *income*; 4th, on *expenditure*; and 5th, on *franchises and privileges*.

1. A *poll tax* is a capitation tax of a limited character. It is imposed equally on the *male* population, sixteen years old and upwards. And as we have very few idlers, it is almost exclusively a tax on *labor*; still, as the wages of labor are high, and the profits of the laborer bear a full proportion to the profits of stock, it seems reasonable that a portion of the public burdens should be borne in this way. Besides, *personal liberty* should pay something for its protection, as well as property. The sums assessed, however, on the polls, are small, and never exceed *one sixth* of the tax required.

2. The *second* species of taxation, is the *property tax*. From this is derived the chief revenue of *the State*. It is assessed on real and personal estate, without regard to the income. It may be a question whether productive and unproductive property should be taxed alike, and if not, which should bear most of the burden. Real estate often, especially wild lands, is kept untouched, that surrounding improvements may enhance its value; and unproductive personal estate is often that which is chiefly ornamental. In these cases there certainly seems to be no good reason why such estates should be favored in the requisitions for public expenditure. Farming utensils and implements of trade should be, however, exempted from taxation, and they usually are.

3. The *income tax*. The property tax in Maine includes money at interest, debts due, money on hand, public securities, bank and other stocks, merchandize, vessels, pleasure-carriages, and cattle and horses, as well as all other personal estate not specially exempted. The *income tax* embraces that on *professions* or *employments*, *annuities*, and *legacies*. Objections may be made to a tax on production. But though a tax on profits discourages enterprise, it seems reasonable, nevertheless, that a man should contribute to the public exigencies, in *some* measure in proportion to his gains.

4. *Expenditure*. This is our most popular tax, and the one from which the *national* revenues are chiefly derived. It is objectionable, on the ground that it is first assessed and advanced by him who does not ultimately pay it, and is ultimately paid with the additions of the mercantile profits of previous purchasers of the article taxed. And it is further objected to, that it is a bounty to the *producer* at the expense of the *consumer*. When this is an impost upon the importation of *foreign* merchandize, not produced in the United States, and it comes to a quick market, it falls chiefly on the consumer; but when it is upon articles which may be produced at home, and brings into competition the foreign and domestic producers, it may fall on the producer or consumer, or both, according to the state of the market. Thus a protecting duty may so balance the price of the foreign and domestic article, as to keep the competition alive between these different producers, and eventually bring their respective products cheap to the consumer. But upon *luxuries*, and indeed upon all articles not indispensable, it is paid *voluntarily*, and is so intermixed with the article purchased, that it is scarcely thought of.

5. *Franchises and privileges*. Privileges have been the subjects of taxation in proportion to the benefit derived from the grants. These grants are made to individuals or corporations, when some public benefit is expected, as well as profit to the grantee. Colleges, charitable institutions, turnpike and canal corporations, are never taxed, in consideration that the benefit to the grantees is fully balanced by that to the public.

Taxes are imposed on banks, inventions and discoveries, and postage, on the ground that these "exclusive privileges" do not confer on the public a benefit equal to that conferred on the grantee.

The wages of labor, the rent or income of lands, and the profits of stock, should all endure their just proportion of taxes. Labor in the United States, and especially in Maine, is scarce, and commands a high price. Lands are cheap, and stock is not abundant, as the legal and ordinary rate of interest is six per cent. It is, perhaps, impossible to determine who is the ultimate loser, by the payment of *any* tax. The laborer may be remunerated by his employer, and he in his turn by the consumer, and if the consumption is *reproductive*, this last may find his retribution in the article reproduced.

The DESIGNS or PURPOSES of taxation are—

1st, The common defence and general welfare of the whole United States. This is confided by the Constitution to the General Government, which is to defend us against foreign and domestic enemies, and take care of our commercial interests.

2d, To provide for the internal peace and security of the people of the State, and for the preservation of their rights and liberties.

3d, *Internal improvements*, such as the construction and repairs of highways, bridges, canals, &c.

4th, *Education*, for the support of primary schools, and the endowment of academies, colleges, and other institutions of learning.

5th, The support and comfort of the poor.

All these, except the first, are confided, though perhaps not exclusively, to the government of the State.

SECTION I.—EXCLUSIVE POWER OF TAXATION.

The Constitution of the United States has granted to Congress the power "to lay and collect taxes, duties, imposts, and excises;" and imposts or duties on imports and exports, are

prohibited to the States, except with the consent of Congress. So that while the power of laying and collecting most other taxes is *concurrent* with that of the States, the *impost*, or *duty on importations*, is *exclusive*. The *purpose* or design of this power of taxation, is “to pay the debts, and provide for the common defence and general welfare.”

Auxiliary to this grant, and if necessary, in anticipation of its exercise, is that “to borrow money on the credit of the United States.” And *incident* and *essential* to this, and indeed every other power, is that to make all laws which shall be “necessary and proper” for carrying it into execution.

The *restrictions* on this power of taxation are—

1st, That “no capitation or other direct tax shall be laid but in proportion to the *census* or *enumeration*—which embraces the whole number of free persons in each State, (including those bound to service for a term of years,) and three fifths of the slaves, and excluding Indians not taxed.

2d, “No tax or duty shall be laid on articles exported from any State.”

3d, “No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another. Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.”

The power of taxation which is *exclusive* in the Congress of the United States, extends—

1st. To the *impost*. This is a tax on expenditure. It is advanced by the importer of the merchandize taxed, to the officers of “the customs,” as they are called, and remitted by them to the treasury of the United States. It is imposed for *revenue*, or for the protection of commerce or domestic manufactures. When it is imposed on articles which are not of the product of our own soil or industry, it is a *revenue tax*, and is, as a general rule, paid ultimately by *the consumer*. But this is not universally true. It often happens, in the vicissitudes of trade, that it falls on the *importer*, and more frequently on the *producer*. Much depends on the state of the market, and the necessity of the producer or importer to force a sale. But

when the impost is imposed on foreign merchandize, such as is also produced by our own people, for the purpose of protecting our own industry, it is very far from being generally true, that it falls on the consumer. If the domestic article bears a small proportion to the importation, it may be a long time before a home competition will be adequate to a reduction of the price, and in the mean time, the burden must fall on the consumer. The imposts on iron and hemp are illustrations. If, on the other hand, the protection gives a rapid stimulus to the domestic production, the competition of the foreign and domestic producers will throw back the impost on them, and even more than relieve the consumer. The manufacture of cotton fabrics, is a striking instance. Where the protection is so strong as to amount to a prohibition, or nearly so, of the foreign product, it leaves our own producers in possession of the market without a competitor, and is consequently a tax on the consumer, until a home competition is invited by the prospect of participating in the profits, when the same benefit results to the consumer as in the case of foreign and domestic competition. An example occurs in the cases of *nails, hats, and shoes*.

The principal part of the revenues of the United States for the support of Government and the payment of the public debt, have been derived from *the impost*. The public lands have, to be sure, been productive, but it should be recollected that the purchase money, in more than one instance, and the expense of location and sale, have been paid from the avails of the impost tax.

2d. *Franchises and privileges*. The exclusive power of granting these, and taxing them as an equivalent for the grant, is vested in Congress.

First, In the case of the United States Bank. The charter was granted for twenty years, and a bonus was paid into the Treasury of the United States, as a consideration for the grant. *Reservations* also were made in the charter for loans to the Government, at an interest limited and specified. These were taxes upon the franchise for the public benefit. And it has

been judicially determined that no State could impose a tax on any branch of that Bank, though located within its limits. The right of *taxing* is, therefore, co-ordinate with that of *granting*.

Second, *Patents for inventions and discoveries*. The Constitution has given to Congress the power to secure, for limited times, to authors and inventors, the exclusive right to their inventions and discoveries ; and a Patent Office has been established and organized, at the seat of government, and partly, perhaps, to defray the expenses of its organization, a tax is imposed on each patent for an invention or discovery. As the power to *grant* the patent, when exercised, becomes exclusive, so is the right to impose the tax as the consideration of the grant.

Third, Of the same character is the tax on *postage*. The grant is "to establish post offices and post roads." Not so much as a source of revenue, as to defray the expenses of the establishment, a tax is imposed on the carrying of letters, newspapers and pamphlets. The rates of postage are moderate, and of all taxes it is the least onerous and most beneficial, as it is *voluntary*, and each one who pays is more than remunerated in the facilities of correspondence, information and instruction. These facilities have been so extended, that very little of the revenues of the establishment has been paid into the United States' Treasury. Sound policy, indeed, should never make this establishment a source of revenue much beyond its necessary and economical expenditures.

These, it is believed, are all the taxes which can be imposed exclusively by the United States.

SECTION II.—CONCURRENT POWER OF TAXATION.

A concurrent power remains in the States, to impose all taxes, except those on *imports* and *franchises*. When the

Constitution of the United States was under discussion, this concurrent power of taxation in the United States was strongly objected to, under the apprehension that it might become paramount. And, indeed, some of our commentators seem to have made this power in a State rather *subordinate* than *concurrent*. The defenders of the Constitution of the United States were so hard pressed on this point, that they were obliged to admit that, in case of collision, *mutual forbearance* must settle the difficulty. But, for want of this mutual forbearance, the case of all others which ought to be guarded against, these expositors have left us no remedy. If the United States and a State lay a tax on the same article, whether land or distilled spirits, *at the same time*, it is said that the United States have priority, and if they consume the whole article taxed, the State must fail of its collection. This, however, seems to me to suppose a case which could never occur. No doubt exists that both Congress and the State Legislature *might*, in granting a tax, make it a *lien* upon the property taxed, *from the time of the enactment*. The law of Congress of 22d July, 1813, granting a direct tax, provided, however, that the taxes *so assessed*, should be and remain a *lien* upon all lands &c. for two years after the assessment, notwithstanding any subsequent conveyances. The assessments of the State, likewise, as it is believed, constitute a similar lien. Now whether this lien is made to commence at the time of *granting* or of *assessing* the tax, it would be very improbable that either the grants or assessments of the United States and State should be *simultaneous*. It follows that there will be a priority of lien, and the question is presented, can this priority avail the State against the United States? If the State has granted its tax on lands, and made its assessments, and thus acquired its lien upon its property taxed, can the United States, by a subsequent grant and assessment, divest the State of its priority? Had the State's collector, at the time the United States lien attached, proceeded so far as to *sell the land*, the United States could scarcely defeat the sale. The *purchaser* would acquire a title, and if the United States should tax the same lands to

the *seller*, the assessment would be erroneous. Moreover, if the lien took effect *by the assessment of the State*, and this was prior to any lien by the United States, it is not readily perceived how the latter could defeat the State in the one case more than the other. If, therefore, the State is *prior in time*, its priority will avail against the United States. It is, then, in a case only of simultaneous grant or assessment, or both, that the United States can claim precedence—a case which never has occurred, and probably never will. It is in this event only that the State's power becomes *subordinate*. In all other cases, it is like every other concurrent power, the exercise by one excludes the subsequent exercise by the other, where both cannot be exerted upon the same object.

In case of an *excise*, which is “an inland tax or impost laid on commodities consumed, or on the retail, which is the last stage before consumption,” it would seem that the same precedence would take place by priority of grant and assessment, as in the case of taxes on land.

By the Constitution of Maine it is provided—

1st, That “no tax or duty shall be imposed without the consent of the people or of their representatives in the Legislature.”

2d, That “while the public expenses shall be assessed on *polls* and *estate*, a general valuation shall be taken at least once in ten years.”

3d, That “all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just valuation thereof;”—and

4th, That “all bills for raising a revenue shall originate in the House of Representatives,” subject to any amendments of the Senate, relating to the subject matter.

The Legislature of Maine, until the year 1836, found it expedient to grant and assess an annual tax upon the inhabitants of the State. The tax is predicated on the *valuation* required by the Constitution, and is partly a *capitation* or “poll,” partly a *property*, and partly an *income* tax. It is assessed on each town and plantation, and the *capitation* or *poll* tax is not to

exceed one sixth of the quota required of such town or plantation. The rest is assessed on the *property* and *income*.

There is, besides, a tax on *franchises* and *privileges*. The taxation embraces—

I. Real estate, improved or unimproved, according to the value.

II. Personal estates, including—

1st. Money at interest, more than the interest paid.

2d. Balance of debts due.

3d. Money on hand.

4th. Public securities.

5th. Bank stock, and shares or property in other incorporated companies, according to the value.

6th. Stock in trade, not exempted by law.

7th. Ships and vessels at home or abroad, and their stores and appurtenances.

8th. Pleasure-carriages.

9th. Horses, mules, and neat cattle of a year old and upwards, and swine of six months and upwards.

10th. The *income* from any profession or employment, or by legacy or annuity.

11th. All other property returned taxable by the last valuation.

The exemptions are—Sheep, not exceeding forty to any one owner; household furniture; wearing apparel; farming utensils; tools of mechanics, necessary for their business; and the machinery of cotton and woolen factories, not including *carding* machines.

The freeholder or tenant taxed for the whole premises may require the other to contribute *half*, unless it is otherwise agreed. The assessment embraces the property, whether real or personal, as it was on the first of May next preceding, and if the owner of cattle, horses, &c., shall have sent them from home for keeping previous to that time, he shall be taxed for them in the town or plantation where he is an inhabitant.

III. *Franchises* and *Privileges*.—The tax of one per cent. on the capital stock of banking corporations, is neither on *pro-*

perty or *income*, but on the *franchise* or *privilege*, and was intended as a fair equivalent for the grant. In banks, however, whose bills are current, at par with gold or silver, the public lose nothing by the bills, while the bank pays them a tax upon its *capital vested*, without regard to its *income*. Those privileges can never be exclusive, which are fully paid for.

The State has also imposed taxes of a like character on the admission of attorneys, the commissions of Judges, Justices of the Peace, Sheriffs, &c. Whether this is a *concurrent* or *exclusive* power, may be questionable. As these would come within the denomination or scope of equivalents for franchises or privileges granted by the State, it would seem that Congress could not tax these any more than the State could tax the United States Bank. Yet a stamp-duty has been imposed on *commissions* and *bank notes*, which would seem to be an indirect exercise of the power in question.

The State has also levied taxes, from time to time, on sales at auction, and licenses to retail liquors and other articles of merchandize. These are in the nature of an *excise*, in which the United States have a concurrent power, whenever they may find it necessary to exercise it.

CHAPTER SECOND.*

COMMERCE.

COMMERCE is frequently used in the limited sense of “mercantile intercourse with a foreign country,” while *trade* is made to denote “traffic among the inhabitants of the same country.” But this distinction is without foundation—either word being entitled to a comprehensive and general interpretation. “Commerce” or “trade,” then, is *an exchange of commodities, whether the object of the exchange be consumption or resale at a profit*. It is an erroneous notion that in trade one nation must lose what the other gains. With nations, as with individuals, exchanges may be mutually profitable, and where it is not so, the trade will not be long continued.

Another error, still more common, is, that money may be made by foreign trade only, while all inland transactions are mere transfers from hand to hand. If trade is of mutual benefit to the parties, *internal* trade, to the same extent, would bear a proportion to the external as *two* to *one*. But when we add that the domestic exchanges are by far the most frequent and the expense of transportation is generally much less, it is a reasonable computation that the profits of internal to external traffic are as *six*, if not *eight*, to *one*.

The exact limit between productive and unproductive industry has not been successfully defined; but it is believed that the productive character belongs as strongly to home as to foreign transactions. The *guardian* class of the community has been, without due consideration, ranked as *unproductive*. Now to what extent can this be true? If one of twenty men guards the field from depredations, while the nineteen plant, cultivate and secure the crop, why is he not as much a productive laborer as the rest?

* Const. and Laws U. S. Anderson's Commerce. McPherson's Annals. Federalist. Commercial Treaties, Story's and Kent's Com. Congress Journals.

And why may not the Legislatures, the Army, the Navy, the Judiciary, and all those whose duty it is to enact and administer the laws, and protect the citizen in his person and property, be considered as productive laborers, as well as the agriculturalists or the manufacturers ?

It is the doctrine of many that if government gives security to property, and unrestricted freedom to the developement of industry, commerce will take care of itself. But all the capital of a nation is not mercantile, and the *torpor* may be so general that the clearest demonstration of advantages which might be derived from a new species of industry, will never induce the people to make the experiment. It is true, government will sometimes, in its zeal to protect commerce, act with precipitation and in complete ignorance of its true interest. But it is not to be inferred, therefore, that government should *never* interfere. Were all commercial nations to leave commerce to individual enterprise, unencumbered by onerous regulations and exactions, and at the same time tender to all their neighbors equal benefits and facilities with their own citizens or subjects, such a system would very probably improve the condition of trade. But the framers of the Constitution of the United States had learnt by sad experience, that without the *power* to regulate commerce, we must depend upon the commercial regulations of other nations ; and they provided, therefore, that Congress should have power "*to regulate commerce with foreign nations, among the several States, and with the Indian tribes.*" To *regulate* it is to establish rules whereby it is to be managed. This power to *regulate* admits of a broad construction. Indeed, it has been claimed to embrace whatever relates to commercial transactions. To "regulate commerce" an embargo has been imposed, without limitation of time. As incident, and "necessary and proper" to this regulation, a National Bank has been established, with branches in the States, exercising their functions *against* State authority. As commercial regulations, navigation laws, and those for the protection of seamen, have been enacted. And under this constitutional grant, it is presumed, the laws regulating the fisheries are autho-

alized. By the same authority, and for the same object, countervailing duties, of both impost and tonnage, have been imposed, as well to protect domestic manufactures as to raise a revenue.

Incident, also, to this power, and to aid in its execution, is the grant to coin money, regulate its value, and punish counterfeiting. Money is the representative and measure of value. By means of money, wealth incessantly circulates from producers to consumers. It facilitates all exchanges ; it is the *sign* and the *pledge* of wealth. It is not, nevertheless, the *sure standard of value*. Money, like every thing else, may be cheap or dear, as it is plenty or scarce. As there is, generally, enough in the world for all the purposes of exchange, when it happens to be scarce in one country it is plenty in another, and consequently becomes an article of traffic. Were all the money in the world to be instantly *doubled*, since every thing to be obtained in exchange would continue the same, two dollars would be required, instead of one, to purchase the same article. When, therefore, we imagine money to be plenty or scarce, it is often because we are deceived in its value. For the same reason we mistake the revenues of a nation. Looking at the estimated value of our imports or exports, we seldom take into the calculation *the relative value of money*. It is *the quantity* consumed, and not its cash value, which we should regard as the standard.

Gold and silver, having an intrinsic value, are, by *coining*, (stamping with a government device indicating its value) converted into money. This power of *coining* money, (which is, in effect, establishing it as legal currency,) of fixing its value, and of foreign coins, is vested exclusively in Congress.

Bank notes or bills, however, issued by incorporated companies, supply, in a great measure, the place of coin. As the specie remaining in circulation within the community is limited by the demand for a circulating medium, if any expedient can be devised for substituting bank notes in place of half the specie, this half may be spared for exportation. The returns from this will be its value, with the mercantile profits, in other

commodities, and the national capital will be enlarged to the full amount. But these bills must always be such as are readily and instantly convertible into specie. The bank should be not only ready to pay its notes in gold or silver, on demand, but should be at all times within the reach of the holders. Bank notes, on a specie basis, have always constituted by far the greatest portion of our circulation. Since the expiration of the charter of the United States Bank, the bills in use have been those which issued from the State banks. The circulation of these is consequently *local*, and the bills are often at a discount, especially when found at a distance from home.

SECTION I.—COMMERCE WITH FOREIGN NATIONS.

The maxim which has governed every administration of the United States, is "Peace, commerce and honest friendship with all nations—entangling alliances with none." In 1778, and in a critical period of our revolution, we had been almost forced, from our necessities, into an offensive and defensive alliance with France, in which we had guarantied to her her then North American colonies. After the adoption of the Constitution of the United States, and during *her* revolution, we were called on to fulfil the guaranty in regard to those colonies, which were, one after another, captured from her by Great Britain. This we were unable to do, and after protracted and embarrassing negotiations, we were obliged to pay her an *equivalent*, in a release of the claims of our merchants for spoliations on their commerce. From this entangling alliance we are not yet relieved, as the merchants demand, and with great justice, that as we had taken their demands to discharge our debts, we should turn round and remunerate them, to the amount of the property released, or, at least, the fair value of the equivalent which we obtained in the discharge from the guaranty. Admonished by this single instance, we have ever since taken care to avoid all entangling alliances.

Commerce with foreign nations is regulated sometimes by *laws*, which are only operative within our own jurisdiction, and subject, consequently, to be counteracted by those of the nation with which we trade ; but chiefly by commercial *treaties* or *conventions*, negotiated and made by the President, with the advice and consent of the Senate, two thirds of the members present concurring. These treaties, when ratified by both of the contracting parties, and the ratifications exchanged, become the supreme law of the land.

The United States have always been even punctilious in the observance of the faith of treaties with foreign nations. At the time of the adoption of the Constitution, we had commercial treaties only with France, the Netherlands and Prussia, and by that instrument it was provided that treaties *made*, as well as those *to be made*, were the supreme law, and that the Judges of the States were bound by them, in defiance of all State authority.

Although one nation has a perfect right to give to another, commercial privileges which it denies to all others, we have carefully avoided to exercise this right. We have treaties of commerce with all the European States, with the exception of Portugal and the Swiss Cantons, with the Barbary Powers in Africa, and with Brazil and most of the Spanish American States. As yet we have no treaty with any Prince or State *merely Asiatic*—the Courts of Russia and Constantinople being both European, although their dominions in Asia are very extensive. We have none with the Republic of Hayti, in America, for reasons growing out of the character of her population.

The general provisions in these commercial treaties are—

1st, Freedom of trade—either placing it on the footing of perfect equality, or that of the most favored nation.

2d, That the citizens of each are protected in the dominions of the other, and in case of war there shall be no confiscation of debts, and time is given for subjects and citizens to return home with their effects.

3d, The right of the citizens of each to trade with the enemy of the other.

4th, Blockades are defined, and articles of contraband are specified.

5th, In most cases, free ships make free goods, and enemy's ships enemy's goods.

6th, The right to search a neutral for contraband goods, &c., is regulated.

7th, Rules are established in regard to the armed ships of the enemy of one party in the ports of the other.

8th, Mutual stipulations are made against pirates.

9th, Protection is mutually guarantied in cases of shipwreck.

Consular conventions are sometimes appended to treaties, sometimes negotiated and ratified in separate articles, and sometimes embraced in the body of the treaty itself.

In all treaties the following things are necessary:—1st, That the parties have *power* to consent. 2d, That they have consented *freely*. 3d, That the consent be mutual. 4th, That the execution be possible. But if the ratification has been made by any other than the sovereign power, if it has been obtained by unjust violence, if an error is committed in the object of the covenant, or if execution becomes impossible from the nature of the promise or its interference with pre-existing obligations—in all these cases the treaty ceases to be obligatory.

Treaties cease also to be obligatory, when the sovereign power with which they are made ceases to exist—but a revolution which *transfers* the sovereign power, does not impair their obligation. But when the State passes under the dominion of a foreign power, this abrogates all treaties.

All legislation regulating commerce with foreign nations, must be subject to, and controlled by, treaty stipulations. Treaties of commerce very seldom impose restraints, however, on *taxing* or *wholly excluding* foreign articles of traffic—this being left to the discretion of each nation. Indeed, the exclusion of the entire trade of a nation, would not, in itself, amount to an act of hostility, though it would be invidious, and might induce retaliations which would lead to war.

It is a principle established by our navigation laws, but ap-

plied only to nations which have similar regulations, that no merchandize, &c., shall be imported, except in vessels of the United States, or in such foreign vessels as wholly belong to citizens or subjects of the country of which the merchandize is the production.

Another provision is, that no persons except citizens, (natives or naturalized,) and persons of color, shall be employed in any public or private vessel of the United States. This provision, also, is applicable only to citizens or subjects of such nations as have similar prohibitions.

The *fisheries* carried on beyond the limits of any State, have been regulated by Congress under the authority "to regulate commerce," not "among the several States," but "with foreign nations"—as upon no fair construction can this be considered a regulation between State and State.

The fisheries have been the subject of special regulation as a school or nursery for seamen, as well for the merchant service as for the navy. A *tonnage* bounty is given to vessels of the burden of twenty tons and upwards, employed a given time in the fisheries, without regard to the quantity of fish caught and saved; and to boats and vessels under twenty and over five tons, which take and preserve a certain quantity. Some affect to doubt the constitutionality of bounties, and would endure this on the ground only that it is as a *drawback* of the duty on the salt consumed in preserving the fish. But it would be difficult to distinguish it from bounties on refined sugars, and drawbacks for re-exportation of all goods paying duties. Indeed, the duty on the importation of foreign fish, is as direct a protection to our fishermen, as the tonnage bounty. Vessels concerned in the fisheries, must be *American*, and *enrolled and licensed* as such, and the master and three fourths of the crew must be citizens.

Every vessel of the United States engaged in *foreign* trade, must be *registered*. Without such register, she is subject to the liabilities and exactions of a foreign vessel.

The United States have no colonies, and the trade with those of other nations, especially the British, has been a subject of

much embarrassment. The British colonies being adjacent to, or in the immediate vicinity of, the United States, afford great facilities for commercial intercourse. Great Britain, however, engrosses all the trade between herself and her colonies, for the same reason that she excludes all foreigners from her *coasting trade*. She has, however, permitted us to trade with certain designated ports, in specified articles, paying discriminating duties. We, at different times, have imposed countervailing duties, and at times prohibited the trade altogether.

At present, British and American vessels carry on commerce between the United States and the colonies—in the same merchandize, paying the same duties. But inasmuch as the intercourse *between Great Britain and her colonies* is exclusively British, and always subject to her own regulations, it follows that in imposing heavy duties on the direct trade, and light ones on the circuitous, she has a manifest advantage. Our lumber, transported to her colonies, and thence home, which last must be done by British navigation exclusively, pays a trifling duty, when that upon the same article from the United States amounts to a prohibition. Flour, imported into her North American colonies, and from thence in British vessels to the West Indies, is subject to a trifling impost; while the direct trade, authorized *equally* in British or American vessels, is burdened almost to a prohibition.

SECTION II.—COMMERCE AMONG THE SEVERAL STATES.

This not only includes traffic, but intercourse and navigation, and to regulate it, implies full power over the thing to be regulated, and to exclude the action of all others that would perform the same operation upon the same thing. But it is, nevertheless, restricted to that commerce which concerns more States than one—that which is completely *internal*, being reserved to the State itself.

The Constitution has taken care, however, that “no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.”

Under the authority to regulate commerce *among* the several States, the *coasting trade* has been regulated. This must be exclusively *American*. The vessel, if above twenty tons, must be *enrolled* and *licensed*, and the captain and crew must be citizens or persons of color. If a registered vessel would take an enrolment and license for the coasting trade, she must deliver up her register.

Such licenses are in force no longer than while the vessel is owned, is of the description, and employed in the business set forth in the license. The name of the vessel and the port to which she belongs, must be painted on the stern, and provision is made in case of a change of masters.

The coasts of the United States are divided into three coasting districts—the *first*, including all between the eastern boundary of Maine, to the southern limits of Georgia; the *second*, from the *Perdido* to the western limits of the United States; and the *third* embraces the Florida coasts, from the southern limits of Georgia to the *Perdido*.

And the master of a coasting vessel, destined from one of these districts to another, having on board “distilled spirits, in casks exceeding five hundred gallons,—wines, in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozen,—sugar, in casks or boxes exceeding three thousand pounds,—tea, in chests or boxes exceeding five hundred pounds,—coffee, in casks or bags exceeding one thousand pounds,—or foreign merchandize, in packages as imported, exceeding in value four hundred dollars,—or goods, wares, or merchandize, consisting of such enumerated or other articles of foreign growth or manufacture, or both, whose aggregate value exceeds eight hundred dollars,—shall, previous to the departure of his vessel, make out and subscribe a duplicate manifest of the cargo, containing the name and place of resi-

dence of the shipper and consignee, and make oath that, to the best of his knowledge and belief, the goods were legally imported, and the *duties have been paid or secured* ;” one of which duplicates is to be kept by the captain, and the other by the revenue officer of the port—whereupon a permit is to be granted by such officer to proceed to the port of destination. By a singular incongruity, the law has exempted some of these articles from duty, while the oath and manifest remain the same.

SECTION III.—COMMERCE WITH THE INDIAN TRIBES.

The power to regulate commerce with the Indian tribes, is co-extensive as that with foreign nations. Before the adoption of the Constitution, the Indians were considered and dealt with as, in most respects, independent nations, and as such we have negotiated treaties with them, even though such tribes were established within the limits of a State. Our *commercial* relations with them, had been regulated as well by treaty as by law. We have always denied to other nations any rights of negotiation with the tribes within the limits of the United States, or that any but the United States shall be allowed to purchase their lands, or that any should trade with them, except under statute or treaty regulations. In all other respects, we have admitted them to be sovereign. We have moreover been not very fastidious in *what* the commerce with them should consist, and have never doubted that their *lands* were a fair subject of commerce. By the articles of confederation, Congress had the *sole* and *exclusive* power of entering into *treaties* and *alliances*, except that no treaty of commerce should restrain the States from imposing duties on foreigners, or from prohibiting importations or exportations.

Treaties, previous to the adoption of the Constitution, had been made with many tribes of Indians, by authority of this provision in the articles of confederation. The treaties of

Hopewell with the *Cherokees* and *Chickasaws*, tribes established within the territorial limits of *Georgia*, were made in 1785 and 1786, and before the adoption of the Constitution.

These treaties were considered as obligatory, as well on the State where the tribes were located, as on the United States and the Indians themselves. The concessions made in those treaties to the United States for the benefit of *Georgia*, were never refused or objected to, nor, until all the benefits of them had been realized, was the power to make them ever doubted.

These compacts with the Indians have always borne the name of treaties, have been negotiated diplomatically, and have had, in all respects, the form and substance of treaties. So important was it deemed that we should maintain the faith of national engagements, that, on the 21st March, 1787, Congress *resolved unanimously*, "That the Legislatures of the several States cannot of right pass any act or acts for interpreting, explaining or construing a national treaty, or any part or clause of it, nor for restraining, limiting, or in any manner impeding, retarding or counteracting the operation or execution of the same ; for that, on being constitutionally made, ratified and published, *it becomes*, in virtue of the confederation, part of the law of the land, and *is* not only independent of the will and power of such Legislatures, but also binding and obligatory on them."

The Constitution of the United States *transferred* the power of making treaties, from Congress to the President and Senate, two thirds of that body concurring in the ratification ; and provided that "all treaties *made*, or *which shall be made*, under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the Constitution and laws of any State to the contrary notwithstanding." Now if these were *treaties made* at the time of the adoption of the Constitution, they became, by its express provisions, the supreme law, in defiance of all State enactments.

The United States have always reserved to themselves the right to regulate trade with the Indians. About the years

1823-4, the Cherokee nation having been annoyed and defrauded by pedlars from our white population, passed a law in the Councils of the tribe, *taxing* those who should attempt to trade in their territory, and a memorial was sent to Congress requesting a legislative act confirming *the tax*. It was presented to the Senate, and referred to the Judiciary Committee. Among the papers and documents accompanying this memorial, was the written opinion of a distinguished statesman, fully sustaining the right of the Indians to exercise this sovereign power of taxation, even within the limits of a State. The doctrines there advanced were deemed by the committee to be conclusive, and have been since sustained by the Supreme Court of the United States. It seems, therefore, to be now settled, as far as the Supreme Judiciary can settle it, that the commerce *with* Indian tribes, wherever located, is to be regulated alone by the laws of the United States, or treaties, and that unless there are United States laws or treaties to the contrary, these tribes may regulate their own affairs in their own way.

CHAPTER THIRD.*

MILITARY POWER.

SECTION I.—WAR.

Congress has the power to declare war, and grant letters of marque and reprisal. Incident to this, they can raise and support armies and navies, organize, arm and discipline the Militia, make rules concerning captures, and for the government of the Army and Navy, and of the Militia when in their service. These are grants of sovereignty of a high and transcendent character, and they are necessarily exclusive, as no State can engage in war, but in case of actual or threatened invasion.

SECTION II.—THE ARMY AND MILITIA.

Considering the extent of our territory, our maritime and interior frontier, the Indian tribes which inhabit our borders and within our limits, the character of our Government and the conflicts which might arise from the clashing of Federal and State jurisdiction and between States adjacent, and, above all, our high notions of personal liberty and independence—from all these considerations, strangers have expressed surprise at the small number of our standing Army.

After the late war with Great Britain, Congress attempted to reduce the Army to a peace establishment, but this was not

* Constitution and Laws U. S. Rules and Regulations of the War Department.

fully accomplished until 1821, when it was reduced or arranged to four regiments of artillery and seven of infantry.

To each regiment of *Artillery*, were a Colonel, Lieutenant Colonel, Major, Sergeant Major, Quarter Master Sergeant, and nine companies, with a supernumerary Captain to perform ordnance duty; and each company to consist of a Captain, two *first* and two *second* Lieutenants, four Sergeants, four Corporals, three artificers, two musicians, and forty-two privates.

To each regiment of *Infantry*, a Colonel, Lieutenant Colonel, Major, Sergeant Major, Quarter Master Sergeant, two principal musicians, and ten companies, each to consist of a Captain, *first* and *second* Lieutenants, three Sergeants, four Corporals, two musicians, and forty-two privates.

And to each regiment of artillery, an Adjutant, to be taken from the subalterns of the line.

The corps of engineers, (bombardiers excepted,) and the topographical engineers, were retained in service, and the ordnance department was merged in the Artillery, and the President, as Commander-in-chief, was to select from this corps, the officers and men necessary to perform ordnance duty; and the whole, when so organized, was to be under the command of one Major General and two Brigadier Generals.

Much difficulty arose between the President and Senate on the subject of the reduction and arrangement of the Army, according to the provisions of the act of 1821. By this act, the President was to cause to be arranged the officers, &c., of the several corps then in service, in such manner as to form and complete out of the same, the force authorized by the act, and the supernumeraries were to be discharged. At the time of passing the act, there were *eleven regiments* in service, *viz*: one of riflemen, one of ordnance, one of light artillery, and eight of infantry. These were to be converted into four regiments of artillery, and seven of infantry.

The President, in executing this law, had "razeed," or degraded officers into the places of those next, in grades below them—*viz*. Brigadier Generals to displace Colonels, and officers

of the civil staff were made to supersede those in the line; as, a Paymaster General to the prejudice of a Colonel, &c.—and had made his nominations to the Senate in conformity to this arrangement.

The Senate insisted upon the principles which had always been considered as *military*, that the officers of the different corps were to be arranged according to rank, until each grade was full, and then the supernumeraries of *each*, beginning at the *junior* officer of the grade, were to be discharged, and that no non-combatant could be brought into the arrangement to the prejudice of an officer of the line. After much conflict of opinion, the arrangement was made, nearly in conformity with the views of the Senate.

Such was the peace establishment authorized for the protection of the whole nation. Since that time, there have been added two regiments of mounted dragoons; to each regiment a Colonel, Lieutenant Colonel, Major, ten Captains, ten *first* and ten *second* Lieutenants, besides a Lieutenant to act as Adjutant, a Sergeant Major, one chief musician, four Sergeants, one to act as Quarter Master Sergeant of the company, four Corporals, two buglers, one farrier and blacksmith, and sixty privates to each of the ten companies in each regiment. These, however, were authorized, not as an addition to the peace establishment, but as a defence against actual or threatened hostilities of the Indians.

The whole Army of the United States on the peace establishment, has never exceeded *six thousand*; and this army is distributed chiefly round frontiers of six thousand miles. Yet we have no civil wars, no rebellions, no seditions, and perhaps as little disturbance of the public tranquillity as in any other country. The United States mail even runs its courses, in the great routes and different branches of at least one hundred and twenty thousand miles, without a guard of even a single soldier.

But a solution of this problem is found in *public opinion*—*in an attachment to our institutions*. The people make their laws, and their pride is concerned in their faithful execution.

Every man, woman, and child, is a *prosecutor*, and feels an interest that every violator of the laws should be detected and punished. The aid of the army to keep the peace, would inflict a wound upon the pride and patriotism of every citizen.

The militia, when called into the service of the United States, are United States troops, and subject to the orders of the President. When associated with the troops of the regular army, the United States officer, *of equal grade*, commands them. But whether such officer of inferior grade would be entitled to command both corps, admits of some doubt. It would seem quite clear that if such officer had no command of regular United States troops, he could have no claim to command militia, thus called into the general service, as the Constitution reserves to the States the right to appoint the officers of their militia.

By the returns into the Adjutant General's office in 1832, the whole militia of the States and Territories amounted to 1,244,569—and those of the State of Maine to 39,966.

The militia of Maine are well armed and equipped, and might very soon become fit for active and efficient service. From their exposure to a rigorous climate, and their enterprize and habits of industry, they might be formed into a well disciplined and efficient army more expeditiously, perhaps, than any population of any other country. They have never been called upon to suppress insurrection, or execute the laws. This is all done by the silent operation of public opinion, without any aid of an armed military.

The Secretary of War is the chief of the Department of War. He is to perform such duties as shall be required of him by the President in regard to military affairs, military pensions, and the Indians; and so far as relates to the army, he has the following subordinate departments, subject to his supervision and direction:

1. *The Adjutant General's Department.*—The Adjutant General is the principal channel through which all orders, and every thing relating to the discipline of the army, are communicated to the army, and by him all returns and reports are laid

before the Commander-in-chief. He is charged with the details of the service, with all military records, documents, returns, and commissions, the annual returns of the militia, proceedings of Courts Martial, enlistments, and every thing relating to the recruiting service, and whatever is connected with military history, and making out the annual returns of the army and militia, and the publication of the annual army register.

Orders are *general* or *special*; *general*, when issued from the head quarters of the army. But when issued from *other* head quarters, they are "orders." "*Special orders*" do not relate to the service in general, but to particular objects or individuals.

2. *Inspection Department.* It is through this department that the Secretary of War and the commanding general are to be made acquainted with the actual condition of the army, and especially the character and proficiency of the officers. It is under the superintendence of the *Inspector General*, who is to inspect every branch connected with the military service, and cause accurate reports to be transmitted, annually, to the War Department, through the commanding general. The inspection embraces—1st, The officers commanding brigades, regiments, corps or military posts. 2d, Officers of the army generally. 3d, Non-commissioned officers, musicians and privates. 4th, Officers, &c., of the cavalry. 5th, Regimental and company books. 6th, Quarter-masters, pay-masters, commissaries of subsistence, and all disbursing officers of the army. 7th, Ordnance department. 8th, Armories. 9th, Medical department. 10th, Veterinary department of cavalry. 11th, Commissary General of purchases. 12th, Repairs of forts, &c. 13th, Arms. 14th, Clothing and equipments. 15th, Cavalry horses. 16th, Forage. 17th, Subsistence department. 18th, Quarters and barracks. This inspection is to extend to militia and volunteers on active service and in the field.

3. *Quarter Master General's Department.* This officer is to purchase military stores, camp equipage, and other articles requisite for the troops, and generally to procure and provide means of transport for the army, its stores, artillery and camp

equipage. He is to direct the survey, and superintend the opening and repairing the roads, &c.—the object being to ensure an efficient system of supply, and to give effect and facility to the movements and operations of the army.

4. *Purchasing Department.* It is the duty of the Commissary General of purchases to conduct the procuring and providing of all clothing, and generally all articles of supply requisite for the army, excepting only such as are ordered to be purchased by the Quarter Master's, subsistence, ordnance, engineer and medical departments.

5. *Ordnance Department.* Under the act of 1821, the President was authorized to select from the corps of engineers, the officers and men to perform ordnance duty. The officers in this department now consist of a Colonel, Lieut. Colonel, two Majors and ten Captains.

The senior officer of the department was authorized to enlist for the service of the department, for the term of five years, as many master armorers, master carpenters, master carriage-makers, master blacksmiths, artificers, armorers, carriage-makers, blacksmiths, and laborers, as the public service may require.

He is to direct the proving and inspection of all pieces of ordnance, cannon balls, shot, shells, small arms, side arms, and equipments, and direct their construction. All ammunition and ordnance stores are also within his supervision.

He is to furnish estimates and make contracts. He is to execute all orders from the Secretary of War, and, in time of war, from the commanding general, for supplies in his department, and the keepers of magazines and arsenals are to make their returns to him.

6. *Subsistence Department.* The Commissary General of subsistence superintends this department. He makes estimates of all its expenditures, regulates the transmission of funds to his assistant commissaries, receives their returns and accounts, and examines and adjusts them for settlement at the treasury. The duties, it would seem, consist chiefly in the distribution of provisions. An assistant is established at every post or place of deposit.

7. *Paymaster General's Department.* It is the duty of this officer to make all disbursements of money within that department, to the district paymasters, and to adjust, state and exhibit their several accounts, according to such forms, and within such periods, as shall be prescribed for that purpose by the *Secretary of the Treasury*.

8. *Medical Department.* The Surgeon General is charged with the superintendence and administrative details of this department. The *Medical Director* is to inspect the hospitals, and the *Medical Purveyor* is the purchaser of all medicines and hospital stores. Surgeons and assistants, and, indeed, the whole medical staff, are subject to the orders and instructions of the Surgeon General.

9. *Engineer Department.* The duties of this department comprise the construction and repair of fortifications, and such other public works as may be confided to it by the War Department, and also the selection of sites, and formation of plans and estimates, for these objects. The chief of the corps is charged with the superintendence of the department, and is, *ex officio*, inspector of the Military Academy.

10. *Topographical Engineers.* The duties of this department embrace reconnoitering and surveying, for military and other purposes, and the superintendence of such public works as the War Department may assign. The chief is stationed at Washington, and his *bureau* is the depository of all topographical and geographical drawings, as well as of all books and maps belonging to his department.

He superintends all the subordinate officers in the department, and controls the officers and agents in every thing relating to their duties, and to the disbursement of the public funds put into their hands.

SECTION III.—RULES AND ARTICLES OF WAR.

The criminal code of the Army is contained chiefly in the “Rules and Articles of War,” of which the following is an abstract. In few cases is the punishment of death *absolute*—two only are recollected.

1. For any one belonging to the army employed in foreign parts, *to force a safeguard*.

2. Any person, in time of war, not a citizen, nor owing allegiance to the United States, found lurking as a *spy*, in or about the fortifications or encampments, of the armies of the United States.

For the following offences, the penalty is death or other punishment, at the discretion of a Court Martial :

1. For an officer or soldier to begin, excite, cause, or join in any mutiny or sedition, in any troop, company, party, post, detachment, or guard, in the United States service.

2. Non-commissioned officer or soldier being present at any mutiny or sedition, and not using his utmost to suppress it, or coming to the knowledge of any intended mutiny, and not giving information without delay to his commanding officer.

3. Officer or soldier to strike a superior, or draw or lift a weapon upon, or offer him violence in the execution of his office, or disobey any lawful command of his superiors.

4. Officer or soldier, (having received pay or been duly enlisted,) *for desertion*, or persuading an officer or soldier to desert. But by a late provision, no officer or soldier is to suffer death for desertion *in time of peace*.

5. A sentinel to be found sleeping upon his post, or to leave it before regularly relieved.

6. Officer occasioning false alarms in camp, garrison, or quarters, by discharging fire-arms, drawing swords, beating drums, or by any other means.

7. Officer or soldier to misbehave before the enemy, run away, or shamefully abandon any fort, post, or guard, which he or they may be commanded to defend ; or speaking words to induce others, or cast away his arms and ammunition, or quit his post or colors to plunder.

8. Officer or soldier for doing violence to any person who brings provision or necessaries to the camp, garrison, or quarters of the forces employed out of the United States.

9. Any person belonging to the armies, making known the watch-word to any one not entitled to receive it, or giving a parole or watch-word different from what he received.

10. Any person to relieve the enemy with money, victuals, or ammunition, or knowingly to harbor or protect him.

11. Directly or indirectly to hold correspondence with, or give intelligence to the enemy.

12. Officers and soldiers compelling the commander of a garrison, fortress, or post, to give it up to the enemy or abandon it.

For the following offences the officer convicted is to be *cashiered*—

1. For a false certificate relative to the absence of officers or soldiers, or their pay.

2. Officers knowingly making a false muster of man or horse, and every officer or commissary of musters, wilfully signing the roll of such false muster, or directing or allowing it to be done.

3. Officers knowingly making false returns to the War Department or their superior officers of the state of their regiments, &c., or of the arms, ammunition, clothing, or other stores.

4. Officers knowingly receiving and enlisting any non-commissioned officers or soldiers from other regiments, and on discovery, not to confine them. These to be considered as deserters.

5. Sending or accepting a challenge, if an officer ; (but if a non-commissioned officer or soldier, corporeal punishment at the discretion of a Court Martial.)

6. Officers and non-commissioned officers commanding a guard, knowingly and wilfully suffering any person to go out to fight a duel, and all seconds, promoters, and carriers of challenges, are deemed principals.

7. Officers and soldiers upbraiding others for not accepting challenges.

8. Commanding officers wilfully neglecting or refusing to deliver to the civil authority any officer or soldier accused of a capital crime, or of any offence against the person or property of a citizen, such as is punishable by the known laws of the land.

9. Officers embezzling or misapplying money entrusted to them for the payment of the men under their command, or for enlistments, or for other purposes; and in addition to being cashiered, shall be compelled to refund the money. If a non-commissioned officer, he shall be reduced to the ranks, be put under stoppages until the money be made good, and suffer such other punishment as a Court Martial shall direct.

10. Officers found drunk on guard, party, or other duty—non-commissioned officers or soldiers to suffer corporeal punishment, at the discretion of a Court Martial.

The following offences are punishable at the discretion of a Court Martial. But such discretion must be according to military usage, and does not extend to *death* or *whipping*.

1. Officers, non-commissioned officers, and soldiers using contemptuous or disrespectful words against the President, Vice President, Congress, or the Chief Magistrate or Legislature of any State in which they may be quartered.

2. Officers or soldiers behaving with contempt or disrespect towards their commanding officer.

3. Commanding officer of every regiment, troop, or independent company, or garrison, omitting, through neglect or design, to make accurate returns to the War Department, in the beginning of every month of his command, specifying the names of the officers absent, with the reasons for, and the time of their absence.

4. Resistance to an officer attempting to quell quarrels,

affrays, and disorders, by refusing to obey, or drawing a sword upon him.

5. Non-commissioned officer or soldier selling, or designedly or negligently wasting ammunition delivered to him to be employed in the service of the United States.

6. Non-commissioned officers or soldiers selling, losing, or spoiling, through neglect, their horses, arms, clothes, or accoutrements, are to undergo weekly stoppages, (not exceeding half pay,) to repair the loss or damage, and confinement, and such other corporeal punishment as the Court Martial may inflict.

7. Non-commissioned officers and soldiers found one mile from camp, without leave in writing from the commanding officer.

8. Officers or soldiers lying out of quarters, garrison, or camp, without leave of the superior officer.

9. Non-commissioned officer or soldier not retiring to his quarters or tent at the beating of the retreat.

10. Officers, non-commissioned officers, or soldiers, failing to repair at the time fixed, to the place of parade, of exercise, or other rendezvous, not prevented by sickness or necessity, or going from the rendezvous without leave of the commanding officer, before he shall be regularly dismissed or relieved.

11. A soldier hiring another to perform his duties, (except in cases of sickness, disability, or leave of absence)—and the party hired, and the officer allowing it, and the non-commissioned officer conniving at it, are all alike punishable at the discretion of a regimental Court Martial, and the non-commissioned officer to be reduced to the ranks.

12. Officers or soldiers, without urgent necessity or leave of their superior officer, quitting their guard, platoon, or division.

13. Officers and soldiers, who, while in quarters or on their march, shall commit waste, or spoil, or maliciously destroy the property of the inhabitants.

14. All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles, are to be taken cognizance of by a general or reg-

imental Court Martial, according to the nature and degree of the offence, and to be punished at the discretion of the Court Martial.

Dismissions from service or striking from the rolls, are allowed in the following cases :

1. Any commissary of musters, or other officer, taking any gratification on mustering any regiment, troop, or company, or on signing any muster-roll, shall be displaced from his office, and shall be thereby disabled to have or hold any office or employment in the service of the United States.

2. Any commissioned officer, convicted before a general Court Martial of conduct unbecoming an officer and a gentleman, shall be dismissed the service.

3. Commissioned officers, store keepers, or commissaries, selling without authority, embezzling, misapplying, or wilfully or negligently suffering any provisions, &c., belonging to the United States, to be spoiled or damaged, shall make good the loss, forfeit their pay, and be dismissed the service.

Pecuniary penalties are prescribed for neglecting to attend divine service, or behaving irreverently at the places of worship, and for profane cursing and swearing.

The chaplain, for unnecessary absence from his duty, is subject to a deduction from his pay, or dismissal from the service.

An officer using reproachful or provoking speeches to another, may be put in arrest, and if a soldier, be confined and compelled to ask pardon of the person offended, in the presence of his commanding officer.

Commanding officers are to keep good order, and redress all disorders and abuses.

If an officer thinks himself wronged or injured by the commander of his regiment, and upon application to him is refused redress, he may complain to the commanding general of the State or Territory, who shall examine and take proper measures for redress, and forthwith transmit a state of the case to the War Department.

If an inferior officer or soldier thinks himself wronged by his captain or other officer, the commander of the regiment

shall, on complaint, order a regimental Court Martial, from which either party may appeal to a general Court Martial. But if, on a second hearing, the appeal shall appear vexatious and groundless, the person so appealing shall be punished at the discretion of the Court Martial.

If a commissioned officer die or be killed, the second officer of the regiment or post, or the assistant military agent, shall take charge and make an inventory of his effects, which inventory he shall forthwith transmit to the Department of War.

If it be a case of a non-commissioned officer or soldier, the commanding officer of the troop or company shall, in the presence of two commissioned officers, take a similar account of his effects, and transmit it to the War Department. And if officers so having effects of deceased officers and soldiers in their hands, shall leave their regiments or posts, they must first deposite the effects which remain in their hands, with the commanding officer or military agent.

All officers, conductors, &c., and other persons receiving pay or hire in the artillery or engineers, are subject to the rules and articles, and to be tried by Court Martial, as officers and soldiers.

All sutlers or retainers to the camp, and all persons serving with the armies, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.

And all officers and soldiers of any troops, whether militia or others, mustered and in pay of the United States, when acting in conjunction with the regular forces, are subject to the same rules and regulations.

“The functions of engineers being generally confined to the most elevated branch of military science, they are not to assume, nor are they subject to be ordered to any duty beyond the line of their immediate profession, except by special order of the President of the United States ; but they are to receive every mark of respect to which their rank in the army may entitle them respectively, and are liable to be transferred, at the discretion of the President, from one corps to another, respect being paid to rank.”

Officers of State troops or militia, when acting in conjunction with the regular army, on detachments or Courts Martial, shall take rank next after officers of like grade in the regular forces, notwithstanding the seniority of their commissions.

Every non-commissioned officer or soldier enlisting into the service, shall take an oath to his fidelity and allegiance, and to obey the President and the officers appointed over him, according to the rules and articles ; and, being so enlisted and sworn, he shall not be dismissed the service without a discharge in writing, signed by a field officer of his regiment, or by his commanding officer, where no field officer is present ; and no discharge shall be given before the time of service is expired, but by order of the President, Secretary of War, the commanding officer of a department, or the sentence of a Court Martial. *Officers* not to be discharged but by order of the President or by sentence of a Court Martial.

Rules as to furloughs and absences are prescribed, and the duties of commanding officers and commissaries of musters in this respect ; and particular monthly returns of the force, to the War Department, are required of each commanding officer.

CHAPTER FOURTH.*

NAVY.

SECTION I.—CIVIL ADMINISTRATION.

Until 30th April, 1798, the affairs of the Navy were confided to and conducted by the Secretary of War. By the act of that date, it is provided that there shall be an executive department, under the denomination of "the Department of the Navy," the chief officer of which shall be called "the Secretary of the Navy," whose duty it shall be to execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war; as well as all other matters connected with the naval establishment of the United States.

By an act of 7th February, 1815, a board of Commissioners was established, to consist of three officers of the Navy, not below the rank of post-captain, and attached to the office of the Secretary of the Navy, and under his superintendence were to discharge the ministerial duties of the office, relative to the procurement of naval stores and materials, and the construction, armament, equipment and employment of vessels of war, and to perform all other duties relative to the establishment.

They may, under the direction of the Secretary, prepare rules and regulations for securing a uniformity in the classes of vessels and their equipments, for repairing and refitting them, and securing responsibility in the subordinate officers and agents,

* Const. and Laws U. S. Rules and Regulations of the Navy Department.

and, upon requisition of the Secretary, are to furnish all estimates of expenditure which the service may require, and such other statements as he may deem necessary.

By this division of the duties, the superintendence and control are reserved to the Secretary, and the practical service is confided to practical men. Whether this distribution of power produces that energy of action and unity of design that this important department requires, has been doubted by some. The experiment cannot, perhaps, be fairly tested until we shall be engaged in war with one of the great maritime powers.

SECTION II.—DISCIPLINE OF THE NAVY.

The Navy is a very important arm of defence. Commercial as we are and always must be, an efficient Navy is indispensable ; and no *neglect* on the one hand, or *favour* on the other, should ever be allowed to impair its efficiency or diminish its respectability. A navy policy has been doubted by distinguished statesmen, and this arm of our defence became, consequently, unpopular for a time. But in our last war with Great Britain it not only commanded respect, but admiration, and such was its popularity, that it became the favorite, not to say the *pet*, of the nation.

Our ships of war are, perhaps, equal, if not superior, to any in the world, and no where are to be found better ship-builders than among the native citizens of the United States ; and it is no compliment to say that the officers and men are not inferior to the ships.

Our navy is classed thus—

1. *Ships of the Line.* These are chiefly rated as *seventy-fours*, although many of them carry more than a hundred guns ; some carry a hundred and forty. None under sixty are rated as “line of battle.”

2. *Frigates.* Our largest are rated *forty-fours*, but often carry from *fifty-four* to *sixty* guns ; the smallest *thirty-six*.

3. *Corvettes*. These rate between a frigate and a sloop of war. The denomination is *French*, and in our navy they rank as a large class of sloops of war.

4. *Sloops of War*. These range from sixteen to twenty-four guns, and are a very useful and efficient force for active and expeditious service.

5. *Brigs*. Carrying from ten to twelve guns.

6. *Schooners and Cutters*. These are the smallest in the naval service—gun-boats having become almost obsolete.

The officers in the Navy of the United States rank in the following order—

1. *Commodores*—commanding squadrons.

2. *Captains*—commanding ships of the line or frigates.

3. *Masters Commandant* (now *Commanders*)—commanding sloops.

4. *Lieutenants*, in each grade—precedence according to date of commission, and if of the same date, according to number.

The precedence in the same ship is—1st, *Captain* or commander. 2d, *Lieutenants*, agreeably to date or number of commission. 3d, *Master*. 4th, *Passed Midshipmen*. 5th, *Master's Mate*. 6th, *Boatswain*. 7th, *Gunner*. 8th, *Carpenter*. 9th, *Midshipmen*.

The relative rank of the Army and Navy has been established as follows—

Commodores rank as Brigadier Generals—Captains as Colonels—Masters Commandant or Commanders as Majors—and Lieutenants as Captains. Precedence according to seniority of commission. But this gives no right to officers of either to command the other, nor to exact of each other compliments due to their rank, unless in actual service. The officers and crew of a first rate ship usually exceed a thousand men—making no difference between a war and peace establishment.

The *Commander of a fleet or squadron* is to be at all times acquainted with the state, quality, and number of the ships, their fitness and stores, with the skill of the officers, and have the whole in most perfect condition, and to exercise the fleet

in evolutions. He is not to resign but in case of necessity, and when he does he is to deliver over all papers to his successor.

The *Captain*. If the ship is detached from the fleet or squadron, the Captain is responsible for the whole conduct and good government of the ship, and for the due execution of all regulations which concern the several duties of the officers and company of the ship, who are to obey him in all things which he shall direct for the service of the United States. He superintends the economy of the ship—the supplies and disbursements. He attends at the paying off the crew, and sees that the effects of the deceased are secured. When the ship is in dock, or in ordinary, or fitting or refitting, he must see to every thing, and make weekly returns to the Navy Commissioners. He is to allow each officer to occupy his appropriate cabin; to order sentinels at the entrance of the magazine and store-room, and must be particular to guard against *fire*. It is his special duty to protect the crew from imposition in their traffick-ing with their clothes or pay, to take care of their health, by keeping the ship neat and properly ventilated, and their clothes and bedding dry and clean. He is to see that the sick are properly provided and attended.

The Captain, with the assistance of the senior Lieutenant and other officers, is to examine and *rate the crew*, according to their ability, and without partiality or favor. He is to rate none as “able seamen” who have not been three years previously at sea, nor as “ordinary seamen” but for a like experience of twelve months.

He is to attend to the discipline of the ship, and regulate the exercise with small arms and at the great guns, and is to direct the division and sub-division of the guns.

He must make himself acquainted with the coasts, and is obliged to *convoy* merchant vessels in time of actual or threatened war.

In case of his transfer to another ship, he is to leave his un-executed orders and his muster book with his successor, and his duties in cases of transfer of men from one ship to another

are particularly defined. He is to try no experiments in the rigging, whereby the masts may be in danger. He is to offer the usual civilities to foreign ships entering our ports.

The Captain must be present at the infliction of every punishment, which, if by whipping, is not to exceed twelve lashes for any one offence, except by sentence of a Court Martial.

On his removal from one ship to another, he is to give his successor a particular account of the qualities of his ship, signed by himself, the first lieutenant, master, boatswain, and carpenter—a duplicate of which is to be sent to the office of the Navy Commissioners.

In the event of shipwreck, he is to use every exertion to save life, preserve papers, destroy signals and secret orders, preserve discipline, and get the crew home. In case he is obliged to strike his flag, he must destroy all secret papers. Above all, he is to instruct, *by example*, what constitutes the duties and responsibilities of all grades in the Navy of the United States.

Seven Lieutenants. The senior is a general supervisor of police, and to see the *rules and regulations* carried into effect. The next *four*, according to the date of their commissions, are to keep the *watch* in rotation of four hours each, to sail the ship, and have the entire disposal of the crew for that purpose, reserving one half to be on deck night and day. The *sixth* has the command of that part of the crew called “small arms men,” is to exercise them daily, and as a supernumerary to fill any vacancy in the “watch lieutenants.” The *seventh*, called “the flag lieutenant,” is to have charge of all the signals, to communicate with other ships, under the direction of the Captain, and to act as a sort of diplomatic character in communications with ships or authorities in foreign ports. The guns of a first rate ship are usually divided into six equal divisions, each to be under the command of a lieutenant, and to be exercised or drilled daily one hour or more, the lieutenant being assisted by the midshipmen.

Purser. This is an officer of high responsibility, as he is the receiving and disbursing officer, and the funds for the pay of the whole are intrusted to his hands.

The *Surgeon and Surgeon's Mates* have the management of the medical department. Their duties and responsibilities, in regard to medicine, health, and taking care of the sick are particularly defined, and especially in preparation for, and in time of action.

The *Chaplain*. In addition to the religious duties incident to his office, he formerly performed that of school-master. But since the provision for a *professor of mathematics*, this duty is transferred to him.

The *Master* (formerly sailing master) takes charge of the water, provisions, rigging, spars, anchors, cables, and stowage of the hold, boats, nautical instruments, books and chronometer, and, with the midshipmen, is to ascertain the latitude and longitude, at stated times, and as much oftener as the Captain may direct.

Midshipmen. There are, in a seventy-four gun ship, twenty-five midshipmen and passed midshipmen, whose duties are to obey all lawful orders of their superior officers. They are divided into three or four watches, according to circumstances, are to attend the mathematical school when they can be spared, and to have charge of the *boat* duty, when in port.

Boatswain. His duty, under the master, is to keep the ship neatly and safely rigged, and to aid the men in working the ship.

Gunner. To keep the battery in proper order, and at all times ready for use, and to report it so to the officer of the deck once at least in four hours. In action, he is to attend to the magazine, with his mates, to fill with powder, and see that the guns are promptly supplied, and that the round shot, canister and grape are at hand; to keep the battle lanterns in readiness for lighting, and the cutlasses, pistols, boarding pikes and muskets in order for instant use.

Carpenter. He is to keep all wood-work in repair. In action, with his mates, to stand by with his shot-plugs, to stop immediately all shot-holes near the water line, and to keep the pumps in order and the ship dry.

Sail-maker—whose duties are defined by his title.

The *crew* consists of four hundred “able seamen” and petty officers—four hundred “ordinary seamen”—one hundred landsmen, chiefly apprentices—and from fifty to a hundred marines, under a marine captain and lieutenant, but subject to the rules and regulations of the rest of the ship’s company.

The ships of inferior classes are *officered* and *manned* similarly to the largest, with a reduction of numbers somewhat in proportion to the force of the ship.

SECTION III.—RULES AND REGULATIONS.

The Rules and Regulations of the Navy comprise, substantially, the *criminal code* of that department, and, moreover, prescribe the *rewards*, as well as punishments. The punishments in the Navy are more severe or sanguinary than in the Army. With the latter, capital punishments are chiefly in the *alternative*, as “death, or such other punishment as a Court Martial may, in its discretion, inflict.”

In the following cases the punishment, in the Navy, is death, without alternative or compromise:—

1. To “treacherously yield, or pusillanimously cry for quarters.”

2. Mutiny—*viz.* “to make or attempt to make any mutinous assembly.”

3. Desertion *to the enemy*.

4. Murder committed by an officer, seaman or marine belonging to a public vessel, without the territorial limits of the United States.

5. Any person belonging to the Navy, unlawfully setting fire to or burning public property, not in the possession of an enemy, pirate, or rebel.

In the following cases the punishments are death or other punishment, at the discretion of the Court:—

1. Officers, upon signal of battle or probability of engage-

ment, neglecting to *clear for action*, or to use every exertion to bring the ship to battle, or encourage to fight.

2. For an officer to disregard or neglect orders to prepare for or join in battle, or to desert his duty or station while engaged or in sight of the enemy, or to induce others to do so.

3. Officers or privates, in time of action, to withdraw, keep out of battle through cowardice, disaffection or negligence, or fail in duty to take or destroy vessels which it is their duty to encounter, or to afford relief to our own ships.

4. To give, hold or entertain any intercourse or intelligence to or with an enemy or rebel, without leave of the President, Secretary of the Navy, commander of the fleet or squadron, or the commander of *a single ship*.

5. To receive a letter or message from an enemy or rebel, and not, within *twelve hours*, to give notice to the proper superior ; or, in case of a commander, if he shall not, with *convenient speed*, reveal the fact to his proper superior.

6. Spies, or those coming from or acting for an enemy or rebel, by bringing or delivering seducing letters or messages, or endeavoring to corrupt any person in the Navy to betray his trust.

7. To disobey, strike, draw or offer to draw upon, or raise a weapon against, a superior officer in the execution of his duty.

8. To sleep on his watch, negligently perform the duty assigned him, or leave his station before he is relieved. (If the offender be a *private*, he may, at the discretion of the Captain, be put in irons, or flogged, not exceeding twelve lashes.)

Many, perhaps too many, are the offences which are punished at the discretion of a Court Martial.

Such are for a capturing officer to neglect to preserve and transmit the papers found on board to the Judge of the district, and to the Navy Department and prize agent complete lists of the officers and men entitled to share in the prize.

For persons in the Navy to strip, pillage or maltreat persons taken on board a prize.

To utter seditious or mutinous words, or conceal or connive at mutinous or seditious practices, or to be present at any mutiny or sedition, and not to do his utmost to suppress it.

To treat with contempt a superior.

For negligently, or from other fault, suffering any vessel to be stranded, run on rocks, or shoals, or hazarded.

For exacting compensation of, or maltreating the officers or crews of merchant vessels.

For embezzling or fraudulently obtaining public stores, or permitting it to be done.

For destroying or permitting the destruction of public property.

For plundering, abusing, or maltreating inhabitants on shore, or injuring their property.

For neglect to aid and assist in bringing offenders to punishment.

For making or abetting false musters, or otherwise attempting to defraud the United States.

For oppression, cruelty, fraud, profaneness, drunkenness, or other scandalous conduct.

Officers may be *cashiered* for taking freight, except gold, silver, or jewels, or goods to preserve them from shipwreck, or danger of it, without orders from the President or Navy Department.

Also, for knowingly receiving or entertaining any deserter from any other vessel of the Navy, and not giving information to the proper officer.

The pay and emoluments of officers and men captured by the enemy, who have done their duty in action and after the capture, is to be made up to their death, exchange, or discharge.

Vessels captured from an equal or superior force, are the sole property of the captors; and if of inferior force, are to be divided equally between them and the United States.

Prize money is to be thus divided:—

1. To the commanding officers of fleets, squadrons, or single ships, three twentieths; of which the commander of the fleet or squadron has one twentieth; and the commander of the capturing ship, two twentieths;—but, if taken by a ship acting independently, three twentieths.

2. To sea lieutenants, captains of marines, and sailing masters,

two twentieths ; but, where there is a captain, without a lieutenant of marines, these officers shall be entitled to two twentieths and one third, which one third shall be deducted from the provisions in No. 3.

3. To chaplains, lieutenants of marines, surgeons, pursers, boatswains, gunners, carpenters, and masters' mates, two twentieths.

4. To midshipmen, surgeons' mates, captains' clerks, school-masters, boatswains' mates, gunners' mates, carpenters' mates, ships' stewards, sail-makers, masters at arms, armorers, cockswains, and coopers, three twentieths and one half.

5. To gunners' yeomen, boatswains' yeomen, quarter masters, quarter gunners, sail-makers' mates, sergeants and corporals of marines, drummers, fifiers, and extra petty officers, two twentieths and one half.

6. To seamen, ordinary seamen, marines, and all other persons doing duty on board, seven twentieths.

Whenever one or more public ships or vessels are in sight, at the time of capture, they shall all share equally, according to the number of men and guns on board each ship in sight.

The commander of the fleet or squadron has no share, unless the captor is under his immediate command, though destined for the fleet or squadron ; and commanders leaving the command or station, forfeit their share in prizes taken afterwards.

Twenty dollars for every person on board, at the commencement of the engagement, of any ship of the enemy sunk or destroyed, is allowed as a bounty to be divided as prize money.

Every officer, seaman, or marine, disabled in the line of his duty, is entitled to a pension for life, or during disability, not exceeding one half his monthly pay.

All money accruing to the United States by sale of prizes, is constituted a fund to pay such pensions, and the public faith is pledged to supply any deficiency ; and if any surplus, it is reserved for those whose meritorious services entitle them to their country's gratitude.

CHAPTER FIFTH.*

TREATIES.

SECTION I.—THE EXTENT OF THIS POWER.

Consequent to the powers to regulate commerce and make war, is that of making treaties. This, though a *legislative* power, is vested by the Constitution in the President and Senate.

Of all the powers entrusted to the General Government by the Constitution, this is the most indefinite. Among other nations, treaties embrace conventions of war and peace, offensive and defensive, of commerce and cession, and exchange of territory and population. Treaties, when duly made, are mutual pledges of the faith of nations, are the supreme law, and ride over all municipal regulations.

But how far this extraordinary attribute of sovereign power is limited or restricted by our system of government, has never yet been determined. *In terms*, this power is unlimited. Still, the States have a guaranty of a republican form of government, and a defence from invasion, and it would seem reasonable, that this guaranty was to the extent of its territory and population. How far the dismemberment of a State, or a cession of any part of its territory would be consistent with this constitutional guardianship, is a very grave question. But, inasmuch as each State is equally represented in the Senate of the United States, and the concurrence of two thirds of that body is essential to a treaty, and the frontier States, which are equally exposed to the danger of encroachment, would always constitute more than one third of that body, all this is probably better security than any definition or limitation of the treaty-making power.

* Constitution U. S. Debates on the British treaty of 1794.

SECTION II. — ITS EFFECTS.

A treaty, when once made and ratified, is *the supreme law*, and Congress is as much bound by it as by any other law, nor can they refuse to make provision for its execution, without a violation of the public faith.

The British treaty of 1794, went so far as to modify and repeal State laws in regard to *confiscations*, and British *aliens*. To what extent a treaty may repeal the laws of the States, or how far it may alter, modify, or annul a law of Congress, are *vexed questions*, and it may be long before they shall be ultimately settled. But, if the obligations of allegiance and protection are *reciprocal*, and the citizen has no power of absolving himself from this allegiance, it is a fair inference, that he is entitled to co-extensive protection, and is not to be transferred to a foreign power, without his consent.

CHAPTER SIXTH.*

EXTRA-TERRITORIAL POWERS.

Congress has power to punish *piracies*, and *felonies on the high seas*, and *offences against the law of nations*.

SECTION I.—PIRACY.

Piracy, is defined “robbery or forcible depredation on the high seas, without lawful authority, and done in a spirit of criminal hostility.” It is the same, at sea, as robbery on land.

Pirates are regarded, by all civilized nations, as enemies of the human race, and are every where punished with death.

Congress has included in it, murder, or robbery on the high seas, or in any river, haven, or bay, out of the jurisdiction of any particular State, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, or whatever is *piracy as defined by the laws of nations*.

Robbery of a vessel upon the high seas, or in any open roadstead, or bay, or river, where the tide ebbs and flows, is piracy.

So, if a captain or mariner shall piratically or feloniously run away with any ship or vessel, or any goods, &c., of the value of \$50, or yield up the vessel voluntarily to pirates, or if any seaman shall forcibly endeavor to hinder the commander from defending the ship, &c., or make a revolt therein.

So, to land and commit robbery. But robbery on the high

* Const. U. S. Laws U. S. Story's Com. Kent's Com. Decisions S. C. U. S.

seas, on board of a ship belonging exclusively to subjects of a foreign power, is not piracy. But robbery thus committed, by the crew of a vessel belonging to no known foreign power, is piracy.

The *slave trade* is not piracy, by the laws of nations, but is made so by the statutes of the United States.

In order to suppress the nefarious traffick in human flesh, a treaty was negotiated with Great Britain, which, so far as the two nations were concerned, made the trade piracy, and authorized the search of suspected vessels, and their arrest, detention, and trial for piracy. But the Senate entertained so strong a jealousy of this "right of search," that they would not allow it for the most laudable purpose, lest it might be abused, as heretofore, in capturing American citizens, under the pretext that they were British subjects, and the provision was stricken from the treaty.

SECTION II.—FELONIES ON THE HIGH SEAS.

These Congress has the *exclusive* power, not only to *punish*, but *define*. The common law definition included every species of crime whose punishment was a forfeiture of lands or goods, or both, and to which *might* be superadded that of death or other corporeal punishment.

The term seems to be used in the Constitution and laws of the United States and of Maine, without any definite *signification*. The privilege of members of Congress and the State Legislature from arrest, in going, &c., "except for treason, *felony*, or breach of the peace," must mean something very different from felony at common law, inasmuch as there is scarcely a crime or offence which, by the laws of the United States, or this State, is punishable with forfeiture of estate. *Felony on the high seas* is quite as indefinite. Congress, it is believed, has not given it any definition. It extends, probably,

to all cases punishable with death by the laws of the United States, but what are its exact limits beyond that, is quite uncertain. By the State laws, certain crimes are *described* as *felonies*, or as *felonious*, and these terms are supposed to include all capital offences, and such others, perhaps, as are punishable by imprisonment in the penitentiary or *State's Prison*.

SECTION III.—OFFENCES AGAINST THE LAW OF NATIONS.

Offering violence or insult to ambassadors or other public ministers, is an offence against the law of nations. So, also, is the violation of safe-conduct or passport.

By the laws of the United States, all writs and processes sued out from any Court of the United States, or from any Court, Judge or Justice of a particular State, against the person or property of an ambassador or other public minister of any foreign Prince or State, or against the domestic or domestic servant of such ambassador or minister, are utterly null and void, to all intents, constructions and purposes whatever. And every person, attorney or solicitor *prosecuting*, and all officers *executing the process*, are to be deemed violators of the laws of nations and disturbers of the public repose, and imprisoned not exceeding three years, and fined at the discretion of the Court. But prosecutions for debts contracted before the person became ambassador or minister, are excepted, and the domestics are not privileged unless their names shall have been registered in the office of the Secretary of State, and transmitted to the Marshal's office at Washington, where they shall be fixed in some public place. If any person shall violate any safe-conduct or passport duly obtained under the authority of the United States, or assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, he shall be imprisoned not exceeding three years, and fined at the discretion of the Court.

CHAPTER SEVENTH.*

EXCLUSIVE LEGISLATION.

This extends, 1st, to the territory ceded for the seat of Government,—2d, to places ceded by the States for “forts, magazines, arsenals, dock-yards, and other needful buildings,”—and 3d, to “the territory or other property of the United States.”

SECTION I.—THE DISTRICT OF COLUMBIA.

The cessions of the States of Maryland and Virginia of the ten miles square, to the United States, being the whole extent authorized by the Constitution, gives Congress the exclusive legislation. The Constitution has prescribed no rule or restraint upon Congress, unless the provisions in the ninth section of the first article, and in the amendments, are such, so far as they can apply.

It is rather an anomaly in free government, that a population contained in a territory of ten miles square, and embracing the seat of Government of these United States, should be subject to the almost unlimited power of the Government, in which, it would seem, they could have no voice or representation.

Indeed, it is not only doubtful whether they can, by the Constitution, be represented in Congress, but even whether Congress can grant them a *territorial government*.

* Const. U. S. Laws U. S. Story's Com. Kent's Com.

SECTION II.—PLACES CEDED BY STATES “FOR FORTS, MAGAZINES, ARSENALS, DOCK-YARDS, AND OTHER NEEDFUL BUILDINGS.”

The power of Congress to exercise exclusive legislation over these ceded places, is exercised by them as the Legislature of the Union, and carries with it all the incidental powers to give it execution. If the language of the law is explicit of the intent to give it efficacy beyond the place ceded, it will effect its object. Congress cannot punish murder *generally*, but if the crime is committed in a fort, &c., under the exclusive jurisdiction of the United States, and the criminal flees into a State, he may be arrested by the Marshal, without application to the State authority. “Needful buildings,” may comprehend custom-houses, light-houses, court-houses, and prisons, and post-offices; and, indeed, all other houses and stores necessary for the execution of the powers granted. The States may lawfully reserve the right to execute process within the places ceded.

SECTION III.—TERRITORIES.

The provisions in the Constitution of the United States, by which the power of legislation over, and government of, the vast territories included within the limits prescribed by the treaty of 1783, and subsequent treaties, is in these words: “Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State;” and “all

debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

On the 13th July, 1787, the Congress under the Confederation, had passed the ordinance for governing the north-western territory, which embraces all the western States and territories east of the Mississippi. The whole of these lands had been acquired by cessions from Virginia and other States, to constitute a fund for the payment of the revolutionary debt, and upon certain stipulations for the personal and political rights of the inhabitants.

These engagements, entered into before the adoption of the Constitution, and made valid thereby, were, among others, that there should be *Territorial Legislatures*, and eventually *States* formed in that vast region, as their growth in wealth and population might require.

The different grades of government for these territories have been, *first*, that of a Governor and judges, appointed by the executive authority of the United States; *next*, a Governor and legislative council thus appointed; and *last*, in addition to the preceding, a House of Representatives elected by the people. The laws enacted by either of these grades of territorial government, have been subject to revision and repeal by Congress.

Since the adoption of the Constitution of the United States, from the territory embraced within the ordinance of 1787, four States have been carved out and admitted into the Union.

But other territories than those embraced within our original bounds, and very extensive ones, have been acquired by the cessions of Louisiana by France, and Florida by Spain, and some of our statesmen of the first respectability have entertained strong doubts whether we could by treaty acquire foreign territory, and if so, whether we could admit the inhabitants, as States, into the Union. But as the right to admit new States into the Union, without any such restriction, is given by the Constitution, and as it would seem preposterous

that a nation should be formed with unalterable boundaries, it is not readily perceived on what good ground such an objection could be founded. At any rate, the objection has been removed in practice, and there are at this time five States belonging to the Union composed in whole or in part of foreign territory.

CHAPTER EIGHTH.*

ALTERNATE POWERS.

These are such as rest or remain in the States, until exercised by Congress, and when they cease to be so exercised, revert to the States.

SECTION I. — NATURALIZATION.

To establish a uniform rule of naturalization, implies, necessarily, a power to abrogate every thing which interferes with that uniformity. This power has been, and still is, exercised by Congress, and its legislation annuls, of course, all State regulations.

The applicant for naturalization must have declared on oath or affirmation, before a Supreme, Superior, Circuit, or District Court of a State, (being common law courts,) or the Circuit

* Const. U. S. Story's Com. Kent's Com. Laws U. S. Decisions S. C. U. S.

or District Court of the United States, *two years previous*, that it was his *bona fide* intention to become a citizen, and abjure his pre-existing allegiance.

The Court must be satisfied that the applicant has resided within the United States *five* years, and within the State or territory where he applies *one* year, and during the time has maintained a good moral character, and is attached to the principles of the Constitution, and well disposed to the good order and happiness of the Union. The oath of the applicant is not sufficient to prove residence.

If he holds any title of nobility, he must expressly renounce it.

Any person residing within the United States on the 18th June, 1812, and continuing so to reside up to the time of making the application, may be admitted *without the two years previous application*, provided he proves by other evidence than his own, five years' previous residence.

Minor children, become citizens by the naturalization of their parents.

Children born out of the jurisdiction of the United States, of citizen parents, become citizens, provided such parents have resided in the United States.

A minor, residing here three years previous to his majority, and continuing so to reside for *five years*, may become naturalized after his majority, without the *previous application*, provided he proves his residence by other evidence than his own. In cases where previous application is dispensed with, the requisites must be stated in the certificate of naturalization.

SECTION II. — BANKRUPTCIES.

“Uniform laws on the subject of bankruptcies,” are of the same character, and are exclusive, while they last. This power has been once exercised for a short period, and during the time, State laws were obliged to give way. Since the repeal

of the act of 1800, however, the power has reverted to the States, and they may exercise it, provided their acts do not operate *retractively*, so as to impair the obligation of existing contracts.

SECTION III.—WEIGHTS AND MEASURES.

Though Congress has the power to establish a uniform standard of weights and measures, and such standard, when established, would control all State regulations, still, as no such standard has yet been invented, the whole subject, unfortunately, is left untouched. As the States are waiting for the action of Congress, it is not probable that any improvement will be made until this uniform standard shall have been established. Several eminent statesmen have examined the subject with much science and research, but no satisfactory result has been accomplished. The labors of Mr. Jefferson and Mr. J. Q. Adams, on the subject, have been very profound, and are very interesting and instructive.

SECTION IV.—INVENTORS AND AUTHORS.

Whether the power granted “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,” comes properly into this chapter, may be doubted.

It is by no means certain that this power, when exercised by the United States, is *exclusive*. It is, perhaps, the only grant of power which is strictly *municipal*—or rather, none has less *nationality*. In this respect, it is like the power to promote education, or several others, which are reserved to

the States. Whether, since it has been exercised, it has become *exclusive*, has been questioned. There is nothing in its character which necessarily makes it so, and it is not readily perceived why a patentee of a State might not exercise his right within the limits of the State making the grant, as well as if his patent issued under the laws of the United States. But, be this as it may, it is quite certain that if the power *is* exclusive, whenever its exercise by the United States ceases, it reverts back to the States.

There is a Patent Office established at the seat of Government, through which inventors must apply for a patent for exclusive use.

The application must be made to the Secretary of State, accompanied with a specification, fully explaining the principle and operation, to be signed by him and two witnesses, and the oath of the applicant. This must be approved by the Attorney General, and then the patent is made out under the seal of the United States, attested by the President.

None but citizens of the United States were entitled, but aliens, resident here for two years, are now admitted, superadding in their oath, that, to the best of their belief, there is no prior invention in this or any foreign country. The grant is for fourteen years, and if the patentee dies within the time, his legal representative may take out the patent for the residue of the term, for the use of the heirs or devisees.

No original inventor is to use an improvement, nor is the improver to use the original invention.

The patent is assignable, and the assignment, recorded in the office of the Secretary of State, vests all the rights in the assignee, and subjects him to all the liabilities of the assignor.

Treble damages are given for infringement of a patent, but the defendant may plead the general issue, and give any special matter of defence in evidence, and in case the patent is a deception upon the public, or of prior discovery, it shall be adjudged void, with costs.

The Judge of the District Court of the United States, upon application upon oath and notice to the patentee, may, at any

time within three years after the patent shall have issued, adjudge it void.

If the inventor abandon, surrender, or dedicate his invention to the public, or permit it to go into public use, he cannot resume it.

By the act of 15th February, 1819, the Circuit Court of the United States has original cognizance, "as well *in equity* as *at law*," in all cases regarding the exclusive rights of authors and inventors, subject to appeal as in other cases.

In like manner are authors, and their assignees, secured in their copy-right, for the term of fourteen years, and at the expiration of the term, the author, or his representative, (in case of his death,) may renew it. In all cases, the right is secured by a copy of the title and the author's name being deposited with the clerk of the Court of the District where he resides, and there recorded, and inserting the same in the title-page of the book; or if a map, chart, or print, the author's name and the fact of entry according to act of Congress, must be impressed on the face of it, and publication, in each case, must be made within two months, in one or more newspapers, for the term of four weeks. The right *of authors* is limited to citizens of the United States.

SECTION V.—POST OFFICES AND POST ROADS.

The Constitution of the United States is extremely brief on this subject. "Congress shall have power to establish Post Offices and Post Roads." As there is no prohibition to the States to exercise the same power, it has, by some, been considered *concurrent*, and might be exercised by the State and the United States, provided the establishments do not interfere. But this doctrine is questionable, and the true principle probably is, that while Congress exercises the jurisdiction the State is excluded. Still, if this exercise should be withdrawn, there

can be no doubt that the State might then establish its own Post Office department within its own limits.

It is equally clear that Congress can provide against obstructing the mail on the State roads, after they have been established as mail routes; and it would seem to follow that a discontinuance of such road, by State authority, could not justify shutting it up against the transportation of the United States' mail.

But whether the right "*to establish*" gives the right *to construct*, has been matter of much controversy. And admitting the right, how far the power exists to enforce it and protect the road thus constructed, is also a *vexed question*, and will probably remain long unsettled. Indeed, as the States will, for their own interests, make roads where their inhabitants most need them, and as these are the very places where this beneficent institution will be called for, there will probably be few instances of constructing roads by the General Government, to pass through a State or any part of it; and should such cases occur, it is most probable that the State would have quite as strong an interest to protect the road as the United States. It is provided, by the act of Congress of 3d March, 1825, that whenever it shall appear, to the satisfaction of the Postmaster General, that a post road is obstructed or out of repair, he shall report it to Congress, that they may substitute another. By this, it would seem that the only penalty for obstructing or neglecting a post road, that has as yet been deemed necessary, is to withdraw the privilege from *one* and confer it on *another* portion of the community.

CHAPTER NINTH.*

STATE CONTROVERSIES.

SECTION I.—THE JURISDICTION.

The Constitution has granted this extraordinary power to determine conflicts between sovereign communities, in the third article, which defines the jurisdiction and powers of the Judicial Courts. It is there provided that the judicial power shall extend “to controversies between two or more States,” and that, in all cases where a State is a party, the Supreme Court shall have *original* jurisdiction; and by the Judiciary act of 24th September, 1789, this jurisdiction is made *exclusive* in this Court.

Attempts have been frequently made to prescribe by law the manner of proceeding in such cases; but, whether from State jealousy and a consequent reluctance that this power should be exercised at all, or from a belief that, the Constitution having given it, the Court could find means to exercise it, or from whatever cause, no law prescribing the process or mode of trial has ever been enacted.

SECTION II.—THE PROCEEDINGS AND RESULT.

The proceedings are instituted by bill filed on the equity side of the Court, and a *subpœna* issued thereon to the Governor and Attorney General of the defendant State, and the

* Constitution U. S. Decisions S. C. U. S.

service is made by the Marshal, or the Attorney may endorse an acknowledgment of notice. The following is the form of the subpoena:—

The President of the United States to the Governor and Attorney General of the State of : GREETING.

For certain causes offered before the Supreme Court of the United States, holding jurisdiction in equity, you are hereby commanded and strictly enjoined, that, laying all matters aside, and notwithstanding any excuse, you personally be and appear, on behalf of the people of said State of before the said Supreme Court, holding jurisdiction in equity, on the day of , at the City of Washington, District of Columbia, being the present seat of the National Government of the United States, to answer concerning the things which shall then and there be objected to said State, and to do further, and receive on behalf of said State, what the said Supreme Court, holding jurisdiction in equity, shall have considered in this behalf; and this you may in no wise omit, under the penalty of five hundred dollars.

WITNESS the Hon. Esq., Chief Justice
of said Supreme Court, at the City of Washington, the
A. D. and the independence of the
United States.

A. B., Clerk S. C. U. S.

The service is required, by a rule of the Court, to be sixty days previous to the session.

If the defendant State neglects to appear, no course will be adopted to *compel* appearance, but the Court will proceed to hear the cause *ex parte*. In the case of Rhode Island vs. Massachusetts, the Court intimated that their decree *executed itself*. Its effect *on the jurisdiction*, no doubt, would be the same as a judgment in an action of trespass *quare clausum* would have *on the property*, where the title is in issue—no writ of possession or other executory process would be necessary in either case, except for costs and damages. For these, in a case between States, legislation might be necessary, as it is not readily perceived how the Court could *invent* a process by which they could be collected.

PART III.

UNITED STATES GOVERNMENT.

FOR the execution of the powers granted, a Government is constituted, embracing *Legislative*, *Judicial* and *Executive* powers. In all free States, it is essential that these three departments should be kept distinct and independent, or as much so as shall be consistent with the preservation of each from the encroachments of the others. And it is equally essential that all these departments should be dependent on *the people*—not subject to the sudden freaks or popular excitements of the moment, but the result of their sober, rational reflection and deliberate decision.

CHAPTER FIRST.*

LEGISLATION.

Laws, to be a safeguard to liberty, should be *loved* more than *feared*. It is matter of astonishment that, in a community of States, as it were, embracing an extent equal to two thousand miles square, and a population of every character and climate, there should be such respect to the laws that a peace establishment of six thousand men should be all that was necessary to guard us against external and internal danger, and that, at the same time, there is no nation on earth where the unarmed traveller would, by night and by day, be more safe. It is said that laws should have respect to the circumstances of the people, the nature of the government, the climate and soil, the extent and local situation of the territory, the manner of life of the inhabitants, their pursuits, customs, prejudices, and even superstitions. And yet, laws judiciously enacted and administered contribute much to form the manners, pursuits and character of a people. As laws should be thus diversified, we should despair of establishing any system suited to the condition of all the people of these States, were it not that our sectional wants and necessities are confided to the local authorities. But, as it is, every diversity of character is secured in the enjoyment of what is best suited to its condition.

The style of the laws should be simple, concise and definite, burdened as little as possible with exceptions, limitations or modifications, without subtilty or artifice, and they should speak in the spirit of the purest innocence and candor. They should

* Const. U. S. Const. Maine. Jeffersons's Manual. Rules Senate and H. R. of U. S. Rules Senate and H. R. of Maine.

commence *at once, with the enactment*, without preambles, which are, at best, but lame apologies, and serve rather to confound than to elucidate.

SECTION I. — CONGRESS.

All legislative power granted by the Constitution of the United States, is vested in a Senate and House of Representatives, each having a negative upon the other.

Each House is the judge of the elections, returns and qualifications of its own members, and a majority of each constitutes a quorum, but a smaller number may adjourn from day to day and compel the attendance of absent members.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member. The Vice President is, *ex officio*, President of the Senate, but in his absence they may elect a President *pro tem*. The House of Representatives elects its Speaker, and each House its Secretary, clerks, sergeant-at-arms, door-keeper, and other officers.

SECTION II. — RULES OF PROCEEDING.

The *rules of proceeding* in each House of Congress, together with those of the Legislature of Maine, will be here *substantially* inserted, with notice of the peculiarities of each.

The President of the Senate (in the absence of the Vice President) and Speaker of the House, Secretary of the Senate and Clerk of the House, and all the subordinate officers, are elected by the written ballots of the members.

A majority is necessary for a quorum, and a majority of ballots for a choice. The *Vice President* has no vote in the

Senate, except on an equal division ; and in all cases *by ballot* the *Speaker* shall vote, but in no other case except where the vote is equal or his vote would make it so.

The President or Speaker takes the chair at the hour, and if a quorum is present a journal of the preceding session is read, and errors, if any, are corrected.

If a quorum is, at any time, wanting, the sergeant-at-arms or other executive officer is sent for the absentees. Should they refuse to attend, the House may issue process, even to a *capias*, and compel them.

SECTION III.—DECORUM.

Every member, when he speaks, shall address the chair, standing in his place and uncovered, and when he has finished shall sit down.

No conversation of members shall interrupt business or debate.

No member shall, without leave of the House, speak more than twice on the same day, in any one debate.

In all cases, the member who first rises and addresses the chair shall speak first ; but when this is questioned, the chair shall decide.

No motion shall be debated, until first seconded, nor until reduced to writing, if required by the chair or a member.

Messages between the two Houses are to be sent only when both are in session, and are received during debate, without adjourning it, and in every state of business, except while a question is putting, the yeas and nays are calling, or the ballots are counting.

When a member is called to order, he shall sit down, and the chair shall decide the question of order without debate, subject to appeal for the decision of the House. [In the United States Senate, if a member is called to order *by a*

member, the supposed disorderly words shall be written down before the decision.]

The presiding officer may appoint a member to perform the duties of the chair—such substitution not to extend beyond the next adjournment.

SECTION IV.—PRIVILEGES.

Members are privileged from arrest, except for treason, felony, and breach of the peace, in going to, remaining at, or returning from the place of session.

Even in cases of treason, felony, and breach of the peace, the member of Parliament is privileged as to *the manner* of proceeding. The case must be first laid before the House, that it may judge of the fact and ground of accusation; otherwise, any other branch of the government, or any private individual, might take a member from the service of the House. How far such crime charged against a law of the State, through which a member was going to or returning from Congress, would entitle him to the benefit of this rule, might admit of some doubt.

They are not to be questioned elsewhere for any speech or debate in their respective Houses.

An arrest in violation of this privilege is void, and the member arrested may be discharged on motion, or by *habeas corpus*, and the officer making the arrest is liable to action or indictment, and may, perhaps, be punished by the House, as for a contempt.

An attempt to corrupt a member of the House of Representatives, and a publication defamatory of the Senate of the United States, have been determined to be contempts, and the perpetrators have been ordered to be committed to prison.

The privilege of a member is the privilege of the House, and if he waives it he is punishable.

SECTION V.—QUALIFICATIONS.

The Senate of the United States consists of two members from each State, chosen for six years, by the Legislatures. Their age must be *thirty*, and their citizenship *nine* years, and when elected, they must be inhabitants of the State.

The representatives are elected for two years in each State, by the electors of the most numerous branch of its Legislature. Their age must be *twenty-five*, and their citizenship *seven* years, and their inhabitancy at the time of election, *in the State*.

The apportionment of the representatives is to be in each State according to population, excluding Indians not taxed, and including three fifths of the slaves.

A *census*, or enumeration of the people, is to be taken once in ten years.

State Senators must be of the age of twenty-five years, and Representatives twenty-one, and each must have been five years a citizen of the United States, and one year resident in the State, at the commencement of their term, and three months resident in their respective districts at the time of election.

SECTION VI.—ORDER OF BUSINESS.

Privileged questions, in the United States Senate, are—1, to adjourn; 2, to lie on the table; 3, to postpone indefinitely; 4, to postpone to a day certain; 5, to commit; 6, to amend—which several motions have precedence in the order in which they stand.

In the House the order is—1, to adjourn; 2, to lie on the table; 3, the previous question; 4, to postpone to a day certain; 5, to commit; 6, to amend; 7, to postpone indefinitely.

In the Senate of Maine the order is—1, to adjourn; 2, to lie on the table; 3, to commit; 4, to amend; 5, to postpone to a day certain; 6, to postpone indefinitely.

In the House of Representatives, the order is the same, except that "the previous question" is interposed next after "to adjourn."

The reason why "to commit" and "to amend" are interposed before a postponement to "a day certain," is, that this may be made *to a day beyond the session*, and so operate as an indefinite postponement, and thus defeat a measure before its friends have made it as perfect as they can.

None but the class of privileged questions can be brought forward while there is another question before the House—the rule being, that when a motion is made and seconded, no other can be received but a *privileged question*.

No motion, even for adjournment, can be made while a member is speaking, unless he gives way for *that purpose*—and if for that purpose, no member can supersede him for any other purpose.

If the question in debate contains several points, any member may have a division; but to be divisible, the question must comprehend points so distinct, that any of them being taken away, the others may stand entire.

In filling blanks, the largest sum and longest time are put first.

If the reading of a paper is called for and is objected to, it is determined by the House without debate.

The unfinished business in which the House was engaged at the last adjournment, shall have precedence in the special orders of the day.

The arrangement of the business of the Senate of the United States is as follows:—1st, Motions previously submitted. 2d, Reports of committees previously made. 3d, Bills from the House of Representatives and those introduced on leave, which have been read a *first* time, are read a *second* time and, if not referred to a committee, are considered as in committee of the whole, and proceeded with as in other cases. 4th, After twelve o'clock, engrossed bills of the Senate and bills from the House of Representatives on their third reading, are put on their passage. 5th, If all these are finished before

one o'clock, the general file of bills, consisting of those reported from committees on their second reading, and those reported from committees after having been referred, are taken up in the order they were reported. 6th, At one o'clock, if no business is pending, and no motion to proceed to other business, the special orders are called, at the head of which stands the unfinished business of the preceding day.

Arrangements may, however, be interrupted by new matter, which may be moved at any time, when no other question is before the House.

In the House of Representatives of the United States, all bills, &c., unfinished, which originated in the House at the last session, shall, after six days from the commencement of the session, be resumed, and acted on as if no adjournment had taken place.

As soon as the journal is read, the Speaker calls for the petitions from each State and Territory, beginning with *Maine*, which are presented by the members therefrom respectively, and if unfinished that day, they are resumed in their order on the next. Petitions, however, are not received after thirty days of the session, except on the first session day of each week. Next after these, come reports, first from *standing*, then from *select* committees. After this, a time, not exceeding one hour, is devoted to reports and resolutions, after which, the Speaker disposes of the bills, messages, and communications on the table, and then proceeds to the orders of the day. When the House is in committee, references to "the committee of the whole on the state of the Union," have precedence. On *Friday* and *Saturday* in each week, private bills and private business have precedence, unless ordered otherwise by a majority of the House.

The yeas and nays on any question shall be granted, and entered on the journal, at the call of one fifth of the members present.

They are to be taken alphabetically, and each member must vote, unless specially excused.

When a question has been determined by a vote, any member who voted with the majority may move a reconsideration,

but not after the subject matter shall have gone from the House, nor unless made on the same or a succeeding day. [In the Senate of the United States it is on the same or *two* succeeding days.]

SECTION VII.—BILLS.

One day's notice must be given of an intended motion for leave to bring in a *bill*. A bill is an act or law, drawn out in form, and, until enacted, is called a *bill*. In both Houses of Congress it bears this appellation until the last; but in the State Legislature it is from the first entitled "An Act," &c.

Every bill must receive three readings, previous to its being passed, and each reading must be on different days, unless the House otherwise order. [In the Senate of Maine, but *two* readings are required.]

All resolutions proposing amendments to the Constitution, or for grants of money, or to which the signature of the Executive Magistrate may be necessary, shall be treated in a similar manner.

In both Houses of Congress, all other resolutions and reports of committees shall lie on the table one day for consideration. When a bill is first presented, it is read a first time by the clerk, and handed to the presiding officer, who, rising, states the title, and that it is the first time of reading, and the question is, shall it be read a second time?

A bill cannot be amended in its first reading; it may be opposed and rejected, but this is unusual. It is often, for the despatch of business, read a second time immediately, and by its title, by unanimous consent. The question then is, "shall it be engrossed and read a third time?" [Or, as in the Legislature of Maine, shall it pass to be engrossed?] In this stage, however, it is usual to commit the bill, unless it was reported by a committee.

SECTION VIII. — COMMITTEES.

The bill in its third reading, is taken up in the House of Representatives in Congress, in committee of the whole House. The Speaker leaves the chair, having selected a member to take it as chairman of the committee, the *mace*, a staff surmounted by a spread eagle, at the right hand of the chair, is removed, and the Speaker may take part in the debate, with the other members.

In these committees, the subject is taken up and discussed in detail, and each member may speak as often as he pleases. This committee of the whole cannot refer to another committee, take the previous question, postpone, or receive a message.

If the subject requires another sitting, the committee cannot *adjourn*, but must rise, report progress, and ask leave to sit again; this may be refused, and then the subject is before the House, and the committee may be discharged. If, however, the subject is finished, the committee rise, report the bill, with or without amendments. The amendments, if any, must be first gone through in the House, and concurred in or rejected, before other amendments can be offered.

In the Senate of the United States, they proceed *as* in committee of the whole, or in what is termed a *quasi* committee, and the proceedings are similar to those in the House, saving that the President does not leave the chair, but continues to preside. The Senate may, however, in *quasi* committee, refer to a standing or select committee, admit the previous question, enforce order, take the *yeas* and *nays*, receive messages, and adjourn as a Senate.

But as soon as the bill is gone through *as* in committee of the whole, it is reported to the Senate, and the subsequent proceedings are like those in the House of Representatives.

The correspondent standing committees of each House of Congress, are the following—

Of FOREIGN RELATIONS,	INDIAN AFFAIRS,
FINANCE, [<i>Ways and</i>	ON CLAIMS,
<i>Means of the H. R.</i>]	REVOLUTIONARY CLAIMS,
COMMERCE,	JUDICIARY,
MANUFACTURES,	POST OFFICES AND POST
AGRICULTURE,	ROADS,
MILITARY AFFAIRS,	ROADS AND CANALS,
MILITIA,	PENSIONS,
NAVAL AFFAIRS,	DISTRICT OF COLUMBIA,
PUBLIC LANDS,	PATENTS AND THE PATENT
PRIVATE LAND CLAIMS,	OFFICE—

Each to consist of *nine* members of the House of Representatives, and *five* of the Senate—except the Committee of the House of Representatives on *Patents*, &c., which consists of *five* only.

There are also of the House of Representatives, the Committees of *Elections*, of the *Territories*, of *Revolutionary Pensions*, of *Invalid Pensions*, each consisting of *nine* members—and those of *Accounts*, of *Mileage*, of *Revisal and unfinished Business*, of the *Public Buildings and Grounds*, of *Expenditures in the State*, *Treasury*, *War*, *Navy*, and *Post Office Departments*, and *Public Buildings*, to consist of *five* members each.

There are joint committees on *the Library*, and *Engrossed Bills*, separate committees on enrolled bills, and in the Senate is a committee on their contingent fund.

Select committees in each House are appointed at the commencement of each session, on distinct subjects of the President's message, which do not properly belong to the *standing* committees.

In the Senate of the United States, the chairmen of the standing committees are elected by ballot, and then the members on separate tickets for each committee. A *plurality* elects, and the members rank according to the highest votes; and in case of equal numbers, according to their rank in the *alphabet*. In the House of Representatives, the Speaker appoints the committees, unless it is otherwise ordered; but when

the election is *by ballot*, a majority is required on the *first* trial, and if no choice, a *plurality* elects on the *second*, and the members rank as in the Senate. The *highest* on the ticket is, by courtesy, considered as the chairman, but each committee has a right to elect its own.

A bill or other measure may be committed or re-committed before its final passage, in which case the whole subject is before the committee, unless the reference be *special*. A particular clause may be committed, or so much of a paper to one, and so much to another committee. If the committee reports any amendment to the bill, it is to be again read a second time and considered in committee of the whole, or in the Senate of the United States *as* in committee of the whole, and then the question on its being engrossed and read a third time, shall be again put.

SECTION IX.—COMMITTEES OF CONFERENCE.

These are not *joint* committees, but each is a committee of its own House, each has a negative on the other, and each decides by a majority of its members, and reports to its own House the agreement or disagreement.

A conference is generally before a vote *to adhere*, but may be afterwards. It is either “simple” or “free.” In the first, the reasons are given *in writing*, and reported to each House. At a free conference, the managers discuss *viva voce* and freely, and the reports, with the reasons, are made to each House. These reports cannot be amended. If, after all, each House determines to adhere to its decision, the measure fails.

SECTION X.—EQUIVALENT QUESTIONS.

The questions from the other House to *agree* or *disagree*, are *equivalent questions*—for either necessarily includes the

other. 'To *recede*, *insist*, or *adhere*, are not equivalent, neither of these including the other—for a negative of either is not a positive vote the other way.

SECTION XI.—PREVIOUS QUESTION.

This question is, "shall the main question *now* be put?" If this pass in the affirmative, it precludes debate and excludes all amendments; if in the negative, the main question shall not *then* be put, and it postpones it, at least a day longer.

SECTION XII.—AMENDMENTS.

Amendments may be made so as totally to alter the nature of the proposition. There may be an amendment to an amendment, but no further. To strike out the enacting clause, is moved as an *amendment*, and if it prevails it defeats the bill.

Striking out the *first section*, may or may not defeat the bill.

When it is proposed to amend by inserting or striking out a section or paragraph, it is in order first to amend it.

A motion to strike out and insert may be divided. If not divided, and the proposition is negatived, it is in order to move to strike out the same words and insert others. If this is negatived, it is in order to move to strike out the same words and insert nothing.

A motion to amend an amendment from the other House, takes precedence of a motion to agree or disagree.

A bill originating in one House, is passed by the other with an amendment—the originating House agrees to the amendment with an amendment, the other may agree to their amendment with an amendment. For as the first amendment has been agreed to, and become part of the text, this last amend-

ment is in the *second* and not in the *third* degree. After the bill is passed, and not before, the title may be amended, and is to be fixed by a question, and the bill is then sent to the other House. In the Legislature of Maine, this rule is not observed, and there is consequently to be found, very often, great discrepancy between the *act* and the *title*.

SECTION XIII.—PASSAGE OF BILLS.

When a bill has passed both Houses of Congress, the House last voting on it notifies the other, and delivers it to the joint committee of enrolments, to see that it is duly enrolled on parchment. It is then put into the hands of the clerk of the House of Representatives, to be signed by the Speaker. The clerk then brings it by message to the Senate, for the signature of its President, and the secretary of the Senate returns it to the committee of enrolment, to be presented to the President of the United States.

If the President approves, he signs and deposits it among the rolls in the office of the Secretary of State, and gives notice by message to the House in which it originated, which House by message informs the other. These proceedings all appear on the journals.

If the President disapproves, he returns it to the House that originated it, with his reasons, which are entered at large on their journal, and they proceed to reconsider it. Here the vote must be taken by *yeas* and *nays*, and these entered on the journals.

If this House passes it by a majority of *two thirds*, it is sent to the other House, and if they, proceeding in the same way, pass it also by *two thirds*, it becomes a law, notwithstanding the President's *veto*.

If he does not return it within ten days, it becomes a law without his signature, unless an adjournment within this time prevents its return, in which case it does not become a law.

It will follow that all bills, &c., sent to him for his signature within ten days of the end of the session, may be by him retained and defeated, and his *qualified* negative, thus becomes *absolute*.

The Constitution of Maine has guarded against such a consequence. It is there provided, that unless the Governor return the bill within five days, it shall have the same effect as if he had signed it, unless the Legislature, by their adjournment, prevent its return, in which case, it shall not have the effect, if returned within three days after their next meeting.

As the Governor and members are elected annually, and the Legislature holds, usually, but one session in a year, a new Governor, or the same re-elected, and another Legislature, would have to act upon the bill. If the Governor of the succeeding year, whether the same or another, should entertain the same objections, he will return it, to be acted on by this Legislature, but if he is satisfied with it, he leaves it to become a law, without any action of his.

CHAPTER SECOND.*

SENATE.

SECTION I.—LEGISLATIVE POWERS.

The Senate of the United States is (the Judiciary excepted) the most permanent branch of the Government ; but not, as some have supposed, *entirely* permanent. The members are elected by the State Legislatures for six years, and it was originally so arranged that the term of one third should expire at the end of every two years, *to wit*, with every Congress. Congress terminates biennially, on the 3d of March, but the *two thirds* of the Senate, that survive that period, are not a Senate to any practical purpose. The Senate cannot adjourn over from the 3d to the 4th of March, at the expiration of a Congress. Nor can they act as a Senate if summoned by the President, unless the Senators elected to fill the places of the one third whose terms expired on the 3d, are summoned in to meet the rest.

Each State is entitled to two Senators, and only two, and cannot, by any amendment of the Constitution, be deprived of its equal vote in that body, without its consent. The Senators are elected by the State Legislatures.

As a branch of the Legislative department, it has a concurrent vote with the House of Representatives. It is equally an *originating* body also, with the exception of bills for raising a revenue, which must originate in the other branch. But in these, the Senate may propose or concur with amendments,

* Const. U. S. Cong. Senate Legislative Journal. Senate Executive Journal. Senate proceedings on impeachment. Story's Com. Kent's Com. Rawle Const.

as in other bills. When “vacancies happen in the Senate, by *resignation* or *otherwise*, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments, until the next meeting of the Legislature, which shall then fill such vacancies.” But the expiration of a full term is not such *happening* or casualty as the Constitution contemplates, nor can the Executive of a State *anticipate* the expiration of a term and fill it as a vacancy.

SECTION II.—TREATIES.

The President “shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.”

At the first organization of the Government, the President attended the Senate, in person, and proposed such measures in regard to our foreign relations, as he deemed expedient. If the matter related to the instructions to a minister, or the provisions of a treaty to be made, or already made and presented for ratification, the Senate proceeded to consider it. The President himself presided at these deliberations, and the *advice* and *consent*, if given, must be by a majority of *two thirds* of the members present.

This mode, however, was, from motives of convenience or delicacy, or perhaps both, very soon abandoned, and that by message, as now practised, was substituted.

Whenever a treaty, or any compact or convention with a foreign power or Indian tribe, is laid before the Senate for ratification, it is read a first time for information only, when no motion can be received to ratify, reject or modify it.

At its second reading, and on a subsequent day, it is taken up and considered as in committee of the whole, and the question may be put on each article, “will the Senate advise and consent to the ratification of this article?” And it passes in the negative, unless two thirds concur.

Motions may be made to *strike out* or *insert*, in which case the question is, "shall the words stand as part of the article?" &c.—it requiring *two thirds* to carry the affirmative.

After the treaty has been gone through, a resolution of ratification, with such modifications as the Senate may have made, is, on a subsequent day, presented—which may also be amended—and, when passed, by an affirmative of two thirds, the President is notified by message.

In a case where, pursuant to a treaty provision, a controversy had been referred to a foreign sovereign, and his opinion or decision had been submitted by the President to the Senate, for their advice and consent, it was determined that a question on the validity of the umpire's report was a question, not of *executing*, but of *finishing* a treaty, and that, consequently, the President was right in presenting it to the Senate, and that it required the constitutional majority of *two thirds* to carry an affirmative.

SECTION III.—SENATE EXECUTIVE POWER.

All nominations for appointments to office by the President, must be made to the Senate, for their advice and consent; except that the appointments to *inferior* offices may be vested by law in the President alone, in the heads of departments, or the courts of law; and except, also, that the President may fill all vacancies which happen in the recess of the Senate—which temporary appointments expire with the next session of the Senate.

Nominations for *re-appointments*, and generally of *appointments*, are referred, in the Senate, to the appropriate committees, and, in cases of disbursing officers, a rigid scrutiny is usually made into the state of their accounts at the Treasury. It is often the case, when there are objections to the character and qualifications of the officer nominated, that evidence is taken by order of the committee, with consent of the Senate, and the parties are heard before the committee, and the whole case, with the evidence, is reported.

SECTION IV.—SENATE JUDICIAL POWER.

The Senate has the sole power of trying IMPEACHMENTS.

The members must be on oath, and *two thirds* are necessary to convict.

The impeachable offences are “treason, bribery, and other high crimes and misdemeanors.”

The accusation must be against a *civil* officer, for an *official* offence. Members of the Senate and House of Representatives are not subject to impeachment—they not being, in the constitutional sense, *civil officers*.

Upon the charge of an impeachable offence, against a civil officer, made to the House of Representatives, a committee is appointed, and if, upon examination, they find the charge to be true, a resolution is offered that the supposed offender be impeached, stating, briefly, the cause.

If this resolution is adopted by the House, a member or members is directed to proceed to the Senate, and impeach the officer charged, and to signify to that body that articles of impeachment will be exhibited against him, and to request that process may issue for his appearance.

The Senate then takes order for the appearance of the accused, and the House is notified.

The House then proceeds with the articles of impeachment, which are usually reported by the same committee, and when they are adopted, *managers* are appointed to conduct the impeachment, and the Senate is notified.

Whereupon, the Senate forms itself into a Court of Impeachment, and the members are sworn, of which the House has notice.

The managers are introduced into the Court, proclamation is made by the sergeant-at-arms, and the articles are read by the chairman of the managers.

The managers are then informed that the Court will take order thereon, and they withdraw.

A summons is then issued by the Secretary, by order of the Senate, to the accused, to appear at a given time, and the House is again notified.

The Court meets at the time—the officer returns, on oath, the service of the precept ; whereupon the accused is called, and if he appears, he either gives in his answer to the articles, or asks further time.

The answer need not observe great strictness of form. He may plead guilty as to part, and defend as to the residue, or, saving all exceptions, deny the whole, or give a particular answer to each article separately—to which there may be replication, rejoinder, &c.

Witnesses are usually examined in open Court ; but all questions must be in writing, and put through the chair.

The House, as the grand inquest, and as prosecutors, have a right to be present at the trial.

The doors are to be kept open during the trial, and the accused may appear by himself and his counsel.

The managers open the prosecution with the charges, proof, and argument. The accused, by his counsel, proceeds to open the defence, and to close it. And the whole is closed by the reply of the managers.

The Court then proceeds to pronounce upon the charges contained in each article, separately. The members are called alphabetically, and each rises, and, without argument, answers directly whether the accused is guilty or not guilty. The question is put on each article.

If less then two thirds concur in his guilt on some one of the charges, he is acquitted. But if the constitutional majority determines him guilty, the Court then proceeds to pronounce sentence. 'This is limited, by the Constitution, to removal from office and disqualification. It may be the removal only, or the disqualification may be perpetual or for a limited time. But neither conviction nor acquittal bars prosecution at law.

CHAPTER THIRD.*

HOUSE OF REPRESENTATIVES.

SECTION I.—EXCLUSIVE POWERS.

The House of Representatives has the sole power of impeachment.

It shall originate all bills for raising a revenue.

In case of failure of an election of President by the electoral colleges, the House becomes the electors in the last resort. But this is done *by States*, each State giving *one vote*—*viz* : its vote is that of a majority of its delegation, and if no majority, for any one of the constitutional candidates, the State loses its voice in the election. A member or members from two thirds of the States must constitute a quorum, and a majority of all the States is required for a choice.

After it shall have been ascertained by opening the returns and counting the votes, that no one candidate has a majority of all the votes given, the House meets in the Representatives' Hall, and from the three highest numbers on the lists, a President is to be chosen.

The delegation of each State acts by itself, receives and counts the votes for the State, and reports them to the clerk, who enters them on a schedule. If upon the reports of the whole, no one has a majority of all the States, the attempt is repeated, until some one candidate is returned, having a majority. When this is effected, the Speaker announces the choice, the Senate is notified, and a joint committee is appointed to notify him of his election. The whole proceeding is entered on the journals of the House.

* Const. U. S. Debates on the British Treaty. Jefferson's Manual.

SECTION II.—CONCURRENT POWER.

In all *legislation*, the House of Representatives has a concurrent power with the Senate, except in the case of *treaties*, which are to be made by the President with the advice and consent of the Senate, two thirds of the members present concurring; and even in this, it has been insisted that the House of Representatives must concur, or at least have a discretionary power to grant or refuse the provisions necessary to the execution of the treaty.

In most countries, England excepted, treaties are made by the legislative power; and even there, if they touch the laws of the land, they must be approved by Parliament. The King cannot by treaty make a *citizen* an *alien*. The American treaty of 1783, required the sanction of Parliament.

But the Constitution of the United States having vested this legislative power in the President and Senate, it is not readily perceived how the House can defeat or annul it, especially in cases where the treaty requires no appropriation of money or other legislation to carry it into effect.

CHAPTER FOURTH.*

EXECUTIVE POWER.

The supreme Executive authority is vested in the President of the United States.

SECTION I. — QUALIFICATIONS.

He must be a natural born citizen, or one at the time of the adoption of the Constitution—have attained the age of thirty-five years, and been fourteen years a resident within the United States.

As the Constitution provides that he shall not be *eligible* without these qualifications, it is a fair inference that they refer *to the time of his election*.

SECTION II. — ELECTION.

Each State, in the manner its Legislature shall direct, chooses electors equal to its number of Senators and Representatives in Congress.

No Senator or Representative, or person holding an office of trust or profit under the United States, can be an elector.

* Const. U. S. Kent's Com. Story's Com. The Federalist. Executive Journal. Legislative Journals Senate and H. R. Laws U. S.

The electors are to meet in each State on the same day, and give their votes for President and Vice President, who are to be of like qualifications, and one of whom shall not be an inhabitant of the State with themselves.

They are elected for four years from the 4th of March next succeeding their election, and the electors are to be chosen within thirty-four days from the first Wednesday of December—the day on which the electors are to meet. They are to seal and transmit their votes to the seat of Government, directed to the President of the Senate, who must, in the presence of the two Houses, open all the certificates, “and the votes shall be counted.” The person having the highest number, and a majority, is President. But if no person have such majority, the House of Representatives elects, in the manner we have shown.

In case of vacancy of the office of President, the Constitution has substituted the Vice President ; and in the occurrence of vacancy in both these offices, the President of the Senate *pro tem.*, and the Speaker of the House of Representatives, are successively to act as President.

Congress has provided that in case of vacancy of the offices of both President and Vice President, the Secretary of State shall notify for a new election. But the constitutionality of this law is very questionable.

The Constitution appears to have made no provision for the case of *contested votes*. The President of the Senate is to open the certificates in the presence of the two Houses, *and the votes are to be counted*—but by whom ? In case the votes from a State, or any of them, are contested, who is to decide *whether* they are to be counted ? Is the President of the Senate (as has been asserted) to decide definitively ? A single individual, and probably the candidate himself ! Is it, then, the two Houses thus convened ? If so, the Senate loses its equality, and its voice would now become diminished as *one* to *five*. To this doctrine, the Senate, perhaps, would never agree. The true construction probably is, though by no means free from difficulty, that the decision is to be made by Con-

gress, each House having a negative upon the other. It would be a perilous question at any time, and it would be well if Congress, before any such case shall occur, should provide, by law, for the process and the decision, provided they can do it *constitutionally*.

SECTION III. — DUTIES, COMPENSATION AND LIABILITIES.

The President, before he enters on the duties of his office, is to take the following oath or affirmation:—

“I do solemnly swear, (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.”

This oath is taken on the 4th March, and is usually administered by the Chief Justice of the Supreme Court, and in the presence of the Senate and such members of the last House of Representatives as may choose to be present; and the principal officers of the Government, foreign ministers, and a multitude of citizens, attend this inauguration.

The Constitution provides an adequate compensation for his services, which is not to be increased or diminished during his continuance in office. This compensation is fixed, by law, at twenty-five thousand dollars per year. But he is to receive no other emolument.

He, as well as the Vice President, is removable from office, by impeachment, for treason, bribery, or other high crimes and misdemeanors. When the President is tried on impeachment, the Chief Justice is to preside.

SECTION IV. — MILITARY POWER.

The President is Commander-in-Chief of the Army and Navy, and of the Militia when called into the service of the United States. He, no doubt, may command in person.

The power to make war, and to provide for calling forth the militia to suppress insurrection and repel invasion, is vested in Congress.

Congress has provided that when the United States shall be invaded, or in *imminent danger of invasion*, the President may call forth the militia in such numbers, near the place of danger, as he may deem expedient ; or, when the execution of the laws of the United States shall be obstructed in any State, by a force too powerful to be resisted by the civil authority of the United States, the President may call forth the militia of the State, or of any other State or States, and may retain them thirty days after the commencement of the next session of Congress ; and, to this end, may direct his order to such officer of the militia as he may deem proper to select.

It was, nevertheless, determined by the Judicial authority of one State, 1st, that the Executive of the State was the exclusive judge of *the exigency* for calling out the militia, and, 2d, that the President alone, and no other inferior United States' officer, could command them. The first decision has been *reversed* by the Supreme Court of the United States, and the other has been so fully exploded by public opinion, that, probably, no reversal will ever be necessary. But should the inquiry be whether an officer of the United States, of inferior grade, can command his superior in the militia, the case would present a very different consideration.

It is further provided that, in case of insurrection against the Government of a State, the President, on application of the Legislature or Executive, may call out an adequate force of the militia of other States, to suppress it.

SECTION V.—TREATIES.

I have, under the title “SENATE,” entered with some minuteness into the principles and process of making treaties, and shall here add so much only as regards the powers of the President. Allowing this, as we must, to be a *legislative* power, yet the Constitution has confided this species of legislation to the President, with the concurrence of two thirds of the Senators present.

The practice is changed, as we have seen, and the preliminary and incipient stages of the negotiation are carried on by the President alone, through the agency of ministers. This is as it should be—unity, promptitude and secrecy all justify and require the change.

As soon as the treaty is *formed*, and signed by the plenipotentiaries of the two contracting powers, it is presented, by the President, to the Senate, for its advice and consent. Still the treaty is in its incipient stage, and the President is the exclusive judge whether it is such a treaty as he intended; and if it is in disregard or violation of instructions, or otherwise objectionable, he may withhold it, or, after it is presented to the Senate, may, perhaps, withdraw it.

Foreign governments, knowing the negative power of the Senate, are often reluctant in taking the lead in the ratification; inasmuch as the Senate, after the ratification on their part, may alter or amend it, and thereby render it necessary to open a further negotiation.

Few nations, however, are ignorant of this co-ordinate power of the Senate, in regard to treaties, and when they ratify, it is with the possibility that it may be rejected or amended. And, indeed, there are few countries whose treaties, when first ratified by us, may not be rejected or modified by some co-ordinate or subordinate branch of their treaty-making power.

SECTION VI. — APPOINTMENTS TO OFFICE.

The President nominates, and, with the advice and consent of the Senate, appoints all officers, except of the inferior classes, the appointment of which Congress may vest in him alone, or in the heads of departments such as clerks, deputy postmasters, &c., or in the Courts of law such as their clerks.

He may fill all vacancies which happen in the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

It has been made a grave question, whether the President, in the recess of the Senate, can appoint an ambassador or other public minister to a court at which the United States had not been previously represented. Can this, it is asked, be a vacancy in an office, *happening* in the recess? If it is a vacancy at all, when did it "*happen*"? The necessity of such a power, even in *peace*, but especially in *war*, is manifest, and it has, in fact, been exercised or claimed by almost every Executive since the Government was instituted.

When, it has been asked, was this office, thus pretended to be made vacant, created or established? The only answers which have been attempted, are, that these are offices created by or existing under the laws of nations; that vacancies happen in them as soon as a mission becomes necessary, and of this exigency the President is the judge. That this power is vested in the President as incident to his *military* power, and that it results to him in case of war, actual or impending, is to authorize him, in this species of offices, to pass by the Senate entirely, to confer on him a power in war which is denied him in peace, which would be as dangerous as unconstitutional.

Another position, early taken and sustained by men of high character and patriotism, was that the powers of appointment and removal were co-ordinate; that it required the same power

to annul as to create. This question reaches those cases only where the tenure of office is discretionary. The power to remove *at all* is only *inferred*, as there is no express grant of it, and if it does exist, it would seem to be a fair inference that it was co-ordinate and co-extensive only with the power of appointment. Yet great injury might result if this power, or some modification of it, cannot be vested in the President alone; and still, to grant it to him in its fullest extent, is a delicate trust, and liable to abuse and tyranny. The true construction of the Constitution, on this point, would, perhaps, have been, and I am sure it would have been the safest, that the President might, in the recess, *suspend* an officer who had become unfaithful or disqualified, until the Senate might have an opportunity to act; and unless they concurred, and made his suspension a removal, the officer would be restored. But the early declaration of Congress on the subject, and the consequent practice, seem to have settled the question, and if the power should be abused, and no constitutional restraint can reach the abuse, public opinion must set it right, or the people must endure the wrong.

SECTION VII.—EXECUTION OF THE LAWS.

The President shall take care that the laws be faithfully executed. That this may be done with promptitude, decision and effect, the power is entrusted to a single individual. No discretion is allowed him; otherwise, by suspending the execution, he might, in effect, repeal the laws. It is not for him to deliberate or decide upon the wisdom, expediency, or constitutionality of the laws. These were made with his concurrence, or that of two thirds of both Houses, and it belongs to the other departments of the Government to annul, expound, or repeal them.

SECTION VIII.—TO RECEIVE AMBASSADORS AND OTHER
PUBLIC MINISTERS.

There is much more importance in this power than, at first thought, we might attach to it. Let it be observed that it is vested in the President alone. Neither Congress, whose business it is to declare war, nor the Senate, whose concurrence is essential in a treaty, can control him. And yet the very act of receiving a public minister might involve a case of peace or war. Suppose two parties contending for the sovereignty, and each claiming to exercise the government *in fact*, and each has its minister here, claiming to be recognized, and the claim of each is suspended upon the sole responsibility of the President. It is manifest that, in such a case, the President, by receiving the minister of one party, might involve us in a war with the other.

In every case of a revolted colony claiming to be independent, the recognition of its minister is, in effect, a recognition of its independence, and this is ordinarily a cause of war of the parent State, and yet this belongs to the President alone.

President Washington, at the time of the French revolution, was much embarrassed in the exercise of this constitutional discretion—as was President Madison in the contest for sovereignty in Spain, when the minister of Ferdinand, *Don Onís*, demanded a recognition. President Monroe was in a similar dilemma in regard to the recognition of the revolted provinces of Spanish America. In all these cases, such was the prudence of each President, that we avoided war; but this in no way diminishes the responsibility, or the importance and danger of the trust confided.

SECTION IX.—PARDONING POWER.

Punishment should tread upon the heels of the transgressor. To clear the innocent, and arrest, try, convict, and punish the guilty, with all possible promptitude, should be the object of every government. Still, such is human infirmity, and the consequent imperfection of laws, and of the application of them, that a dispensing power should rest *somewhere*, and, as it ought to be exercised only in extraordinary cases, so it should be vested in a department of high responsibility.

The attribute of mercy, therefore, is very properly conferred upon the supreme Executive. He must, on the one hand, take care that the laws be faithfully executed, and on the other, that the administration of the law should never become an engine of oppression. “Were it possible, in every instance,” says a learned commentator, “to maintain a just proportion between the crime and the penalty, and were the rules of testimony so perfect as to preclude mistake or injustice, there would be some color for the admission of the plausible theory, that ‘the pardoning power is inconsistent with a perfect administration of justice.’”

CHAPTER FIFTH.*

EXECUTIVE DEPARTMENTS.

The Constitution no where speaks of a "CABINET." The term has been invented to define the *confidential* advisers of the President, in whatever duty or power has been confided to *him*.

He may require the opinion, in writing, of the principal officer in each of the Executive *Departments*, upon any subject relating to the duties of their respective offices. The word *Department* is frequently used, though undefined in the Constitution. It is now settled, however, that there are the following Departments, the chief officers or heads of which constitute the President's CABINET—*viz.* the SECRETARY OF STATE, of the TREASURY, of WAR, and of the NAVY, and the ATTORNEY GENERAL, and POST MASTER GENERAL.

SECTION I. — STATE.

The Secretary of State, or chief officer of the State Department, is, in effect, the minister of foreign affairs, and of the home department.

Under the direction of the President, he conducts all the foreign affairs, such as correspondences, commissions, and instructions to and with our ministers and consuls abroad.

* Const. and Laws U. S. Executive Documents. Treasury, War, Navy, and Post Office Reports.

Through him all foreign ministers, and other diplomatic characters, have their audiences with the President, and all their intercourse with the Government. Nominations of ministers, consuls, and commercial agents generally, pass through the office of the Secretary of State.

The Judicial Department is so far under his inspection, that applications for appointments are generally made through his office.

SECTION II.—TREASURY.

This Department is most important, and the office of the Secretary is of the highest responsibility. His chief duties are—

To propose plans for the improvement of the revenue, and the support of public credit.

To prepare and report to Congress estimates of the public revenue.

To superintend its collection.

To decide upon the forms of keeping and stating accounts, and making returns.

To grant, pursuant to appropriations made by law, all warrants for money to be issued from the Treasury, after they have passed the scrutiny of the proper departments of the office.

He shall give information to each branch of the Legislature upon matters which appertain to his office.

He shall digest, prepare, and lay before Congress at the commencement of each session, a report on the subject of the finances, containing estimates of the public expenditures, and plans for improving and increasing the revenue.

And, in fine, do every thing in relation to the finances, which Congress may require.

He is, indeed, the director of all the money concerns of the

United States, and of all the officers engaged in the collection of the revenues.

He is not to engage, directly or indirectly, in trade or commerce, under a heavy pecuniary penalty and removal from office.

The *external revenue*, which he superintends, embraces the custom-house, with all its departments and branches.

The *public lands*, and all connected with their survey, sales, and the receipts and expenditures.

Light-houses, and their regulations.

Revenue Cutters, and other craft employed in collecting the revenue, detecting frauds, and correcting abuses.

The Secretary has a chief, and from fifteen to twenty subordinate clerks, watchmen, &c.

Attached to this department are a first and second comptroller, each with about the same number of subordinates, and five auditors, each with about the same number; the Treasurer with ten clerks, &c., the Register with twenty-five, the Auditor of the Post Office Department with his fifty clerks, &c.

All this constitutes the establishment at the seat of Government, but this is a small portion of those who are responsible to the head or chief of this Department, or subject to his supervision.

Collectors of the customs, naval officers, and surveyors, inspectors, weighers, gaugers, measurers, &c.—keepers of light-houses—officers of revenue cutters, registers and receivers of land offices, and surveyors-general—directors and other officers of the mint,—all amounting to more than 2000, are engaged in the Treasury Department, in regulating the collection and disbursement of the public money.

If we add to all these duties and responsibilities, those which Congress may at any time impose, and especially in negotiating loans, and paying the public debt, we shall have some notion of the immense power of this officer.

SECTION III.—WAR.

Most of the duties of the War Department are prescribed by the President, as Commander-in-chief.

Still, the Secretary of War, as well as the Secretary of the Treasury, is, in some respects, the officer of Congress.

He is obliged, on the first of January, to make, in an annual report to Congress, a distinct account of the expenditures in his Department. He is a member of the Cabinet.

SECTION IV.—NAVY.

The Secretary of the Navy has been often selected for his proficiency and skill in naval science. But such qualifications have been very seldom found to combine those talents that are fitted for the head of a Department requiring system, method, forecast, and policy, and which shall keep a steady eye upon the progress of improvement of the navies of other maritime nations. As a confidential counsellor of the President, it was scarcely to be expected that a professional sailor could be found who was sufficiently profound to give advice on the great and complicated affairs of the nation, foreign and domestic. Professional services have therefore been dispensed with as a qualification for Secretary of the Navy, and the practical duties have been confided to a Board of Commissioners.

SECTION V.—ATTORNEY GENERAL.

His duties, as defined by law, are to prosecute and conduct all suits in the Supreme Court, in which the United States

shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or requested by the heads of Departments, concerning their official duties.

He is also obliged to give his advice, *indirectly*, that is, through the other different Departments, to the several District Attornies, in whatever regards their official duties.

SECTION VI.—POSTMASTER GENERAL.

It is not until lately that this officer has been ranked as one of the President's Cabinet, or confidential council. He is an officer, however, of high responsibility, and extensive influence and patronage.

The office is established at the seat of government.

The Postmaster General has power to appoint three assistants and all his clerks, and to establish post offices and appoint deputy postmasters on any post routes, at his discretion, excepting those whose annual income exceeds two thousand dollars.

He provides for the transportation of the mail throughout the States and Territories, and even makes arrangements with foreign governments for interchange of mail with them, for the facility of foreign intercourse.

Though he cannot *establish* a mail route, he may change or transfer the mail from one route to another. Incident to his power of appointment is that of removal.

He provides for the transportation of the mail, and, in short, collects the revenues of the department and disburses them, and has the supreme control of all officers, contractors, and clerks, amounting to not less than fifteen thousand.

It would seem proper, therefore, that the discretion of such an officer should be subject to the supervision of the President in Council.

CHAPTER SIXTH.*

JUDICIARY.

It would seem a fair, if not a necessary inference, that where Congress has the power to *prescribe the rule* of action, the Judiciary of the United States has the power to expound and apply it, and that where the grant to Congress was *exclusive of the States*, there the jurisdiction of the Courts was also exclusive.

It is justly remarked by a writer in "The Federalist," that if there are such things as political axioms, the judicial power of a government being co-extensive with its legislative, may be ranked among the number." "Thirteen [now twenty-six,] independent Courts of final jurisdiction, over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."

And it may be added, that if any one hypothesis can be more preposterous than another, it is this, that the people of the United States granted to their Legislature the right of *enacting* laws, and reserved to the States the power to *interpret* them.

But it would seem that the *judicial* must be more than co-extensive with the *legislative power*. "The Constitution is the supreme law of the land." Should Congress transcend their powers, and violate this Constitution, where is the remedy, but in the Judiciary?

To confide this restraining power to the Executive, would place him above the laws, and the liberties of the people in the most perilous position.

* Const. and Laws U. S. Kent's and Story's Com. Chitty's Blackstone, Decisions S. C. U. S.

Moreover, if State laws encroach or infringe upon the Constitution of the United States, there must be, *somewhere*, a power to resist and correct them. It is impossible that the General Government can long exist, if each State can fritter away its laws by local enactments.

To guard against such an anomaly and absurdity, the Constitution has provided that "the judicial power shall extend to *all cases* in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, to all cases affecting ambassadors, other public ministers, and consuls, and to all cases of admiralty and maritime jurisdiction." This grant is exclusive and explicit. It extends to *all cases*—1st, which arise under the Constitution and laws of the United States—2d, to *all cases* of treaties *made or to be made*—3d, to *all cases* of admiralty and maritime jurisdiction—and 4th, to *all cases* affecting ambassadors and other public ministers, and consuls.

The Constitution and the laws, and treaties made conformably to its provisions, are the *supreme law*, and ride over *all State authority*. Now that each State should still have, not only concurrent, but paramount authority, in any or all of these cases, would indeed be a hydra in government, of the most confounding character.

To exclude such absurdity, the Judiciary act of 24th September, 1789, gave to the Supreme Judiciary of the United States, appellate, final, and exclusive jurisdiction, in cases decided finally in a State Court, where the decision conflicted with the United States authority.

The judicial power extends, moreover, to *controversies*, to which the United States may be a party—between two or more States—between a State and citizens of another State—between citizens of different States—between citizens of the same State claiming lands under grants of different States—between a State and citizens thereof and foreign States, citizens, or subjects;—but by an amendment to the Constitution, "it does not extend to any suit commenced or prosecuted *against* a State by citizens of another State, or by citizens or subjects of a foreign State."

SECTION I.—SUPREME COURT.

To exercise these powers, the Constitution has provided for one Supreme Court, and such inferior Courts as Congress should from time to time ordain and establish.

This is sometimes termed “the constitutional Court,” and, indeed, it is certain that but one such Court can be established. Still, this could never have exercised its functions, had not legislation given it life and action. No number of Judges had been prescribed, nor any rule of proceeding or decision. All this, however, has been done, and the inferior tribunals authorized by the Constitution, have been established by the act of 24th September, 1789, which is denominated *the judiciary act*—and very properly, as it is the great judiciary superstructure, raised by the wisdom of our statesmen upon the basis of the Constitution.

This Court consists of a Chief Justice, and eight associates, any five to constitute a quorum.

It has original and exclusive jurisdiction of suits or proceedings against ambassadors and other public ministers, their domestics or servants, and original but not exclusive jurisdiction in suits brought *by* ambassadors and other public ministers, or in which a consul or vice-consul may be a party.

It has also exclusive jurisdiction in all civil controversies where a State is a party, except in suits by a State against one or more of its citizens, or against citizens of other States or aliens, in which cases it has original but not exclusive jurisdiction.

In all other cases arising under the grant of judicial power, it has appellate jurisdiction as to law and fact, with such exceptions, and under such limitations, as Congress shall make.

The *original* does not exclude the *appellate* jurisdiction of this Court, for where its original jurisdiction is *concurrent*, a suit originating in another Court, may be re-examined in this.

All conflicts of power between *States*, and between a *State* and the *United States*, must be *finally* and *effectively* determined by this high tribunal. The Constitution and laws of the United States, and the Constitutions and laws of the individual States, are here construed and interpreted, conflicting claims of power are determined and settled, and the equilibrium is preserved.

And all this power seems to be necessary ; and if we object, that this Court may substitute *will* for *judgment*, the answer is, there must be a final tribunal *somewhere* ; and what other can be devised, against which there would not exist the same or stronger objections ?

Such a power, however, is not known to exist, to such extent, in any other Governments. The danger in those Governments, is the want of a Constitution, and the danger in ours, is the confiding the interpretation of the Constitution to fallible man. That the Judges of our Supreme Court, with permanent offices and salaries, and such transcendent final powers, should be watched with some jealousy, is a good symptom. Our Governments are *founded in jealousy*, and that this jealousy should be specially directed to that tribunal to which is entrusted so much of our liberties, *without appeal*, is less matter of regret than of satisfaction. If this should ever become a *morbid* jealousy, and in magnifying the dangers to be apprehended from this tribunal, we should forget, or become indifferent to encroachments from other departments, such a mistake might prove fatal to our union and liberty.

The Judges are liable to impeachment by the House of Representatives, before the Senate, for malfeasance in office, and always subject to the severer ordeal of public opinion. These safeguards, with their high characters and responsibilities, have hitherto proved, and it is hoped will continue to prove, that the duties, delicate as they are, are wisely and properly confided.

SECTION II.—CIRCUIT COURT.

The United States is divided into Judicial Circuits of one or more States, and a Court is held in each Circuit by a Justice of the Supreme Court, and the Judge of the *District* where the Court holds its session. A “District” consists of a State, or a portion of a State.

The original jurisdiction of this Court extends—

To crimes and offences cognizable under the authority of the United States; and this is exclusive, except where otherwise provided.

It has also jurisdiction, concurrent with the District Courts, of crimes cognizable there.

It has original jurisdiction, concurrent with the State Courts, in civil suits, above \$500.

1. In which the United States are plaintiffs.

2. Where an alien is a party.

3. Between citizens of different States.

4. Between citizens of the same State, claiming lands under grants of different States.

The suit must be in the judicial district where the defendant lives, and no arrest in a civil suit is permitted in a district other than that where the trial is to be had. And no assignment of a note, &c., can give jurisdiction, other than the Court would have had without such assignment.

Suits in State Courts against aliens or citizens of other States, of \$500, or more, or where the parties are citizens of the same State, claiming lands under grants of different States, may be transferred by the defendants to the Circuit Courts.

It has appellate jurisdiction from the District Courts.

SECTION III. — DISTRICT COURT.

This Court consists of a single Judge, and his judicial district is limited to a State, and in many instances, to a portion of a State. It has jurisdiction exclusive of the State Courts, of crimes and offences cognizable under the authority of the United States, committed within the district or upon the high seas, where the corporal punishment shall not exceed thirty stripes, the fine one hundred dollars, or the imprisonment six months.

It has original cognizance of all civil causes of admiralty and maritime jurisdiction, and seizures under laws of impost, navigation, or trade of the United States, where seizures are made on waters which are navigable from the sea by vessels of more than ten tons burden, within the district as well as upon the high seas, reserving to suitors their common law remedy; and exclusive original jurisdiction of seizures on land or other waters, and of all suits for penalties and forfeitures incurred under the laws of the United States.

It has also original* jurisdiction of proceedings to repeal patents obtained surreptitiously, or upon false suggestions—subject, however, to a corrective power in the Supreme Court for errors in law, and it has been determined that the questions of fact cannot be decided in a summary way, but that the party charged has a right to a hearing, and trial by jury.

It has also cognizance, concurrent with the State Courts and Circuit Courts, of all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty.

And like cognizance in all suits at common law, where the United States sue, of the value of one hundred dollars; and

* See page 109, and Act Cong. 15th Feb. 1819.

for any amount where an officer of the United States sues, by virtue of an act of Congress; and cognizance exclusive of State Courts, of suits against consuls and vice-consuls.

The right given to aliens and citizens of other States to resort for justice to the national Courts, is liberal and just. The local judiciaries might indulge their prejudices against strangers, or partialities for their own citizens, and they might be tempted to swerve, in such cases, from the line of equity and justice. But the provisions which give one party the right to select its Court, and the other to transfer the cause from a State to a National tribunal, are as fair as the rules of justice can invent.

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

SECTION IV.—COURTS MARTIAL.

The jurisdiction of a Court Martial is exclusively criminal. It is a military tribunal, for the government of the Army and Navy, and of the militia when in the United States' service. It is a *special* Court, the Judges being detailed for the trial of a case or cases which shall have already arisen. When the object is accomplished, their power is at an end. As the jurisdiction of these Courts is not exclusively national, but may be exercised by the States as well as United States, their proceedings will be more properly given in another part of this work.

BOOK SECOND.

PERSONAL RIGHTS AND IMMUNITIES.

It is true that all law relates to the rights of *persons* only, as there can be no rights of *things* ; for *things* can have no rights. Still, as there are personal rights and immunities which are enjoyed in every political society, distinct from property, either real or personal, it is, perhaps, the best method to consider these as a distinct class. The relations which men bear to each other, whether religious, moral or political, are of this character. Those political relations which each bears to the State and National Governments, have been considered in the first Book. All others, not specially connected with property, personal or real, will be embraced under the title of **PERSONAL RIGHTS AND IMMUNITIES.**

CHAPTER FIRST.*

CITIZENSHIP.

In the United States, a citizen is not merely an inhabitant, or one who has the freedom or immunities of *a city*. Wherever he resides, whether in city, village, or country, if he has the right to elect and be elected, and to hold lands, he is a citizen. There are other privileges and immunities of a citizen, but without these he can scarcely be entitled to the character.

SECTION I.—CITIZEN.

One qualification of President and Vice President, Senators and Representatives, is that they shall be “citizens of the *United States*.” A citizen of any State makes one a citizen of the United States. But there are others who, without the rights or immunities, may still be considered as citizens. Minors, children of parents who have the rights and immunities, are entitled to the rank of American citizens. So of females, married or unmarried; and yet these have no political powers. They may, to be sure, hold property, and are entitled to the protection of the laws, but have not the privileges which are understood to constitute the citizen.

* Adam Smith. Vattel's Law of Nations. Montesquieu Sp. L. Const. and Laws U. S. Decisions S. C. U. S. Kent's and Story's Com.

SECTION II.—RECIPROCITY OF CITIZENSHIP.

The Constitution of the United States has provided that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It has been made a question, when and to what extent this right can attach. By the Constitution and laws of Maine, the colored people are, to all intents and purposes, citizens, inasmuch as they have all the civil rights of the whites, with the single exception of intermarrying with them. In Virginia, for instance, these people are entitled to no privilege or immunity of citizens. Nevertheless, the *words* of the Constitution would give to a black man of Maine the right to transfer all these privileges of citizenship into Virginia, and exercise them to the same extent that he does in Maine. Besides, and to carry the illustration a step further, Virginia requires a *property* qualification for a voter, which Maine does not. Upon the same hypothesis, the citizen of Maine may transport himself to Virginia, with a political right which no Virginian enjoys.

The fair construction of this provision would seem to be, however, that a citizen of one State would have the same privileges and immunities in another, as *the people of the same class and condition* there, would enjoy. And, consequently, the black man of Maine, though a citizen here, would acquire no rights in Virginia by this citizenship, to which Virginians of the same color were not entitled. And in case the people where he goes could not elect or be elected *without property*, and the people from whence he comes could do it, he renounces *these* immunities, and acquires *those*.

SECTION III. — ALIENS.

An alien is one born in a foreign country, out of the allegiance of any State or of the United States.

A foreigner naturalized is no longer an alien, but a citizen of the State of which he is an inhabitant.

It has been supposed that the States still retain the power to admit aliens to citizenship. But since the power to establish rules of naturalization has been exercised by Congress, no such power belongs to the States. That aliens may be admitted to hold and inherit lands and other estate, within a State, admits of no doubt. But this does not make them citizens.

By the laws of Maine, an alien widow may be endowed ; and by our treaty with Great Britain, of 19th November, 1794, it was stipulated that British subjects who then held lands in the United States, and American citizens who held lands in his Britannic Majesty's dominions, should continue to hold them according to their titles, and might grant, sell and devise the same as natives, and, so far as respected the lands or the remedies, neither they, their heirs nor assigns, should be considered as aliens.

All aliens are protected in their persons and property, so long as they submit to the laws ; and even in case of war, time is allowed, by stipulations in most of our treaties, for them to depart with their effects ; and without such treaties, humanity as well as policy would require the same or similar provisions in their favor, provided their conduct was peaceable and obedient.

CHAPTER SECOND.*

RELIGION.

From the relation in which man stands to the Deity arises religion, or the Divine law.

Possessing, life, reason, moral perceptions, and the affections of the heart, and all his other sources of enjoyment, he recognizes the duty of *gratitude*; endowed with an intelligence by which he catches a glimpse of that infinite wisdom which he witnesses in every thing that surrounds him, he indulges the sentiment and duty of *adoration*; and feeling his perpetual *dependence* and weakness, he is impressed with the obligation of *prayer*. Perceiving, in fine, the evils of life so disproportioned to its vices and virtues, he infers a future state of retribution, where these seeming errors will be corrected, and hence the duty of *resignation*. Indeed, from the various points of relation between man and his Creator may be deduced the duties of religion. But, if to these obligations and motives, which are induced by natural religion merely, we super-add the lights of *revelation*, we may see how essential are our religious obligations to the welfare of the community. But Government should never interfere with the *police* of religion, nor in any way *prescribe a creed*. Worship is the *voluntary* offering of our affections to our Heavenly Father. When it becomes *involuntary*, it is no longer worship.

In a free government, the laws should never interfere with creeds of different sects, nor give a preference of one to the other, nor enforce the performance of religious duties by penal enactments. Man's intercourse with his Maker should not be

* Chitty's Blackstone. Const. Maine. Const. U. S. Laws of Maine.

controlled by human laws. Government may go so far as to enable each sect to support its own worship in its own way, but should never undertake to prescribe the rules.

SECTION I.—RIGHTS OF CONSCIENCE.

The Constitution of Maine has placed this subject on its true ground. It provides—

1st, That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.

2d, That no one shall be molested or restrained in his personal liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments—provided he does not disturb the public peace, nor obstruct others in their religious worship.

3d, All persons, of whatever sect, demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws.

4th, No subordination or preference of any one sect or denomination to another, shall be established by law.

5th, No religious test shall be required, as a qualification for any office or trust under this State.

6th, All religious societies, whether corporate or unincorporate, shall, at all times, have the exclusive right of electing their public teachers, and contracting with them for their support.

And the Constitution of the United States provides that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.”

These constitutional and *unalterable* provisions are the palladium of our religious freedom. “Unalterable,” until both Constitutions shall be changed in a point regarded as the chief

corner stone of the temple of Liberty. When human laws shall be found necessary to be interposed between *conscience* and *God*, it may make men *hypocrites*, but can never make them *religious* ; at all events, it must make them *slaves*.

SECTION II.—PUBLIC WORSHIP.

In most christian sects, the first day of the week is set apart for public worship, though some insist that the last day is the true Sabbath. The first day, however, is the only Sabbath regarded in the laws of Maine.

Rude or indecent behavior on the Sabbath, in a house of public worship, is punishable by fine.

So, also, if any person wilfully interrupts or disturbs any assembly of people, met any where, and at any time, for the public worship of God, he shall be subject to a pecuniary penalty.

SECTION III.—PARISHES AND RELIGIOUS SOCIETIES.

Every town is a parish, and when a territorial or poll parish is carved out of it, the residue constitutes the first parish in the town. Every person resident within the limits of a territorial parish, if otherwise qualified, is a member until he becomes a member of some other, and when *this* membership ceases, *that* is resumed.

Persons *with their families* incorporated into a religious society, their minor sons continue so after they become of age, until they change their membership.

By the act of 1821, ch. 135, any persons twenty-one years of age, may incorporate themselves into a religious society.

For this purpose, application is to be made to a Justice of

the Peace for a warrant to notify a meeting, and when notified, the persons may proceed and organize themselves by choosing their officers, adopting a name, and doing all things that other parishes or religious societies may do.

They may hold real and personal estate of the annual income of three thousand dollars.

They may raise and collect money for the support of the ministry, for houses of public worship, and other parish charges.

Where members of the parish are the owners of the house, they may assess and collect all or part of the parish charges on *the pews*. But in this case, each one's pew-tax shall go to the support of his own minister.

Any person may become a member of such religious society, by application to and acceptance by such society, and giving notice in writing to the clerk of the society which he leaves. But if he should cease to be a member of the society thus selected, he becomes re-incorporated into the one he left. But each person leaving a society, must first pay his proportion of all monies *raised at the time*.

These provisions do not operate to dissolve any territorial parish, and parishes existing at the time are not affected by them, so long as their members choose to remain.

SECTION IV.—HOUSES OF WORSHIP.

Houses of public worship are subject to different ownerships, *viz.*—The title in the house may be in one, and the pews in another. The *pews* are made, by statute, real estate, and one pew for each debtor is exempted from attachment and execution. The deeds of, or levy of execution on pews, recorded by the town or plantation clerk on his record, have the same effect as deeds and levies recorded in the registry of deeds.

By a late act of the Legislature, a minority of pew holders, not less than ten, of a different denomination from the majority,

may have their proportion of time assigned by three disinterested Justices of the Peace. But, upon an appraisal by the Justices of the value of the pews, not to exceed the original cost, the majority may, at their option, pay the appraisal, and prevent the division. The policy and permanency of this act, remain to be tested.

For different sects to occupy the same house of worship, is much like two or more families to occupy the same dwelling—strife is too often the consequence.

SECTION V.—CHURCHES.

A church is a body of christians adhering to one particular form of worship.

The deacons of protestant churches, not episcopal, and the church-wardens of episcopal churches, are made bodies corporate for the purpose of taking in succession all grants and donations, real or personal, made to their churches, the poor of their churches, or to them and their successors, and may sue and defend, &c. And whenever the ministry, elders, or vestry, shall, in such grants and donations, have been joined with the deacons and wardens, as donees or grantees in succession, the persons thus associated are to be the corporation.

Ministers of protestant churches are made capable of taking in succession parsonage lands granted to ministers and their successors, or to *the use of the ministers*.

A donation of lands to *the use of the ministry*, means the same.

How these privileges to be grantees and donees in succession, can be limited to *protestant* churches, consistent with the provision in the constitution of the State which prohibits *the subordination or preference of one sect to another*, is somewhat difficult to perceive.

CHAPTER THIRD.*

PERSONAL LIBERTY.

This is intended as exclusive of liberty of conscience, already discussed, or the liberty of speaking or writing, which will be noticed hereafter. It embraces our right to *act freely*. That man, in society, has surrendered a portion of his natural liberty, to preserve the rest, is not true, especially if we intend by this, that the sum of natural liberty is thereby diminished. Man, by nature, can only act as he chooses, so far as his actions shall not conflict with those of others. Whether in a state of nature or society, his actions must have relation to others; and hence, he can only act with impunity so far as his actions do not conflict with others' rights. In a state of nature, each one defines his own rights, and the weaker must consequently submit to the stronger; but a combination of strength may overcome him. In society, the community becomes the umpire, and all, consequently, are equally protected—provided, the government is equitable.

In a free government, every one acts as he wills, provided it be without infringing the rights of others. He can be subject to no personal restraint, but for a violation of the laws of the community of which he is a member. It would be difficult to conceive a case of *natural*, greater than *political* liberty, if the government extends its protection equally to all. Natural right, in short, is always subject to the vicissitudes of invasions which might impair or destroy it. Civil right has the guaranty of the whole community for its preservation.

* Paley's Moral and Political Philosophy. Bl. Com. Burlemaqui Nat. and Pol. Laws. Constitution and Laws of Maine, and U. S.

SECTION I.—INVOLUNTARY SERVITUDE.

In Maine there are no slaves. Men, of whatever complexion, have all equal rights. A negro or mulatto has the same right to elect and be elected, and is equal in all things to a white man. To be sure, he cannot intermarry with a white, but on the other hand he is exempted from military duty. The first of these discriminations is by an act of the State, and the other by the militia laws of the United States.

Slavery, nevertheless, exists in many of the States, and the Constitution of the United States so far recognizes it, that it enumerates the slaves and includes three fifths of them, in the apportionment of representatives.

And it is further provided, that no person, held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Under this clause, Congress has provided that when a slave escapes into another State or territory, the claimant or his agent may arrest him and take him before a circuit or district judge, or a State magistrate, and upon proof that he is a slave of the claimant, the judge or magistrate may so certify it, and his certificate shall be a sufficient warrant to carry him back.

Wilfully hindering or obstructing the process, or, after notice, harboring or concealing such fugitive slave, subjects to a penalty of five hundred dollars.

The Constitution of the United States authorized a prohibition of the slave trade, but not until the year 1808. By several acts of Congress, it has been prohibited under severe penalties, and has lately been made *piracy*, and is punished with *death*.

SECTION II.—IMPRISONMENT FOR CRIMES.

A restraint of personal liberty for a violation of the laws of the community of which the perpetrator is a member, is a punishment inflicted by all civilized nations.

Although punishment is never in *revenge*, still, to arrest and confine the offender is right—1st, To deprive him of the power of doing further injury—2d, To hold him out as an example to others.

Incident to this right to punish is that to *hold* the accused to answer to the accusation. Hence the power to imprison for, or on a charge of crime against the State.

But all persons are, before conviction, bailable, “except for capital offences, where the proof is evident or the presumption great.”

By the Constitution of the United States, “A person charged, in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.” To carry into effect this provision, a law of Congress enacts that a copy of an indictment, or an affidavit, of the crime, certified by the Governor or Chief Magistrate of the State or Territory whence the accused is charged to have fled, shall be sufficient to authorize an arrest; and the party arrested to be held in custody until notice and a delivery of the fugitive to an agent, to be transported to the State claiming jurisdiction of the crime. But if no agent appear to take him in six months, he is to be discharged.

To rescue the fugitive is punishable by fine, not exceeding five hundred dollars, and imprisonment, not exceeding a year.

By treaty stipulations, nations are obliged mutually to de-

liver up fugitives from justice. In our treaty with Great Britain of 1794, there is a mutual stipulation to deliver fugitives charged with *murder* and *forgery*.

In 1799, Thomas Nash, *alias* Jonathan Robbins, had been imprisoned in Charleston, in the District of South Carolina, on a charge of *piracy*, committed on board his Britannic Majesty's ship *Hermione*. He was demanded by Sir Hyde Parker, commander of the fleet on the West India station, through Mr. Liston, the British minister, as a British subject; and it appearing to the President that the murder was committed on board of a British ship at sea, and that Nash was an Irishman, who had assumed the name of Robbins and pretended to be an American, and that the evidence of criminality was such as would justify arrest for trial by the laws of the United States,—he was delivered up, tried and executed. An attempt was made in the House of Representatives to censure the President for this, but he was justified by a decisive majority.

In some treaties, such stipulations embrace *deserting seamen*.

By the laws of Maine, a person charged with a capital crime shall be bailed or discharged, if not indicted the second term of the Supreme Judicial Court in the county where two terms are held in a year—or the first term, where there is but one—if the imprisonment in either case has been six months.

Any person under indictment is to be tried the first term, unless the witnesses are absent, from his enticement, or by unavoidable accident.

And all persons under indictment for *felony*, shall be bailed or tried the *second* term, if they demand it.

SECTION III.—IMPRISONMENT ON CIVIL PROCESS.

Imprisonment for debt is deprecated as a species of barbarism. If a man is unable to fulfil his contract or obligation, to *incarcerate* him deprives him of the ability to pay, and his

family, perhaps, of his support. On the contrary, the man who conceals his property to defraud his creditor of his honest due, may be justly imprisoned until he will disclose his effects. Again—there is reason, also, for the distinction between judgments founded on *contract* and on *tort*. If the defendant is proved guilty of fraud, or violence against his neighbor, and is unable to respond the damages, imprisonment may be a proper coercion. It is desirable, at least, to discriminate, if we can, and while we would relieve the honest debtor from the tyranny of a merciless creditor, we should take care to protect the honest creditor against the frauds of a dishonest debtor. But without more than human sagacity, that law which relieves the honest, screens the fraudulent. Did not this difficulty stand in the way, a system of bankruptcy would be a most salutary system.

The relief laws of Maine have undergone many modifications, and are still imperfect, as all laws regulating the relation between debtor and creditor have always been, and probably always will be.

Arrest or imprisonment on mesne process, or execution originating in contract, speciality, or judgment of less than ten dollars, is abolished.

In all other cases of contract, speciality, or judgment, the body is exempted, both on mesne process or execution; except that if the debtor is, in the opinion of the creditor, declared on oath, about to depart out of the State with property more than sufficient for his immediate support, he may be arrested and held to bail; provided the debtor may be taken before two justices, one of the quorum, giving notice to the creditor, and there disclose the actual state of his affairs, and make oath to his disclosure, whereupon the justices, on hearing all the evidence in the case, may discharge or remand him; and in case of the discharge, no execution is to run against his body, but the property disclosed shall be held as attached, or sufficient of it to respond the debt, and the officer is so to return it on his precept.

In any suit founded on such contract, speciality, or judgment, other than by arrest of the body, the debtor may, on

the return day of the writ, or any time while it is pending, appear at the court, &c., or, if the parties agree, before a justice of the quorum of the county in which the suit is pending, and there disclose on oath before the court, or a commissioner appointed by the court, or the justice of the *quorum* agreed upon, the state of his affairs, and thereupon execution may issue against his property only, or otherwise, as the court &c. may determine; but if he neglects to appear, the execution is to run against his body.

In all *other* personal actions, the mesne process or execution may run against the body; but any person arrested or imprisoned in any civil suit, may give bond in double the sum, to be approved by a justice of the quorum, that he will, within fifteen days after judgment, notify his creditor to hear his disclosure, and his taking the poor debtor's oath; and if upon the disclosure it appears that he has attachable property, the judgment is a lien on it for thirty days after the disclosure.

If the debtor does not discharge himself, he is to be committed. But the creditor may discharge him by a levy on the property disclosed, within thirty days. If it appears from the disclosure, or otherwise, that he has attachable property, he may go at large upon his bond, until the creditor makes his election.

Any debtor arrested or imprisoned on execution, may give bond in double the amount, conditioned that in six months he will cite the creditor before two justices, *quorum unus*, and submit himself to examination and take the poor debtor's oath, or pay the demand and costs, or be delivered to the gaoler within the time; and if he fails, judgment in a suit on the bond shall be rendered for the whole demand and interest at twenty-five per cent.

Any debtor imprisoned on execution, complaining to the keeper that he has not enough to support him in prison, the keeper shall apply to a justice for notice to the creditor, to be served fifteen days previous by a sheriff or his deputy, or a constable, on the creditor, or if he lives out of the State, on his attorney, and if he has no attorney, on the clerk of the court &c. issuing the execution.

And upon the return, two justices of the quorum may, upon examination and interrogatories, at their discretion, administer the oath and discharge him; and he is not to be afterwards arrested on the same debt; but if he fails to exonerate himself, the creditor recovers his costs, and he is to be remanded.

Any debtor falsely disclosing, incurs the penalty of perjury. And the creditor may, moreover, sue out a special action of the case, for the false swearing, and upon oath of his belief of its being false, may hold him to bail, and shall, if he prevails, recover double the amount of his demand, and have execution against the body of the debtor, who is to have no benefit of the act for relief.

No discharge of the body of a debtor is to impair the rights of the creditor against his property.

Every person who shall knowingly aid the debtor in a fraudulent concealment or transfer of his property, shall be answerable in a special action of the case in double the amount concealed, but not to exceed double the demand.

When a debtor is confined in prison, the creditor, after eight days' notice, must become answerable for the expenses of keeping him, or he is to be discharged.

This is an abstract of the poor debtor laws, as they are *at present*, but alterations are made or attempted at every session of the Legislature.

SECTION IV.—FALSE IMPRISONMENT.

Every detention or confinement of a person against his will, is an imprisonment; if it be unlawful, it is false imprisonment.

Arrests, without authority of law, are false imprisonments.

If by warrant issuing from a court not having jurisdiction, or against a privileged person, such as a member of Congress, or of the State Legislature, or an elector, in *going, remaining, and returning*—or if the precept be executed at an unlawful time, as on the Sabbath—these, and like cases, are false imprisonments. Kidnapping, or forcible abductions, also, are false imprisonments.

False imprisonment is punishable as a public offence, by indictment, and the offender is likewise liable in damages to the party injured. A further and more effectual remedy is also provided by *habeas corpus*, which will be noticed under that title.

To transport, or cause to be transported out of the State, any person, without his consent, who is lawfully resident therein, or aiding or abetting it, is punishable by fine, or imprisonment in the county jail, or hard labor in the penitentiary, or by any or all of these punishments. A master of a vessel, carrying a minor, apprentice, or indented servant, beyond sea, is punishable by fine, and liable for damages to the parent, master, or guardian.

Knowingly to enlist, or cause to be enlisted, into the United States Army, any minor, without consent of parent, master, or guardian, who shall, within six months after enlistment, go out of the State, or to persuade him to go out of the State for the purpose of enlisting, is punishable by fine or imprisonment.

SECTION V.—HABEAS CORPUS.

Passing by those writs of habeas corpus which are issued for purposes of bringing prisoners from one jurisdiction to another, or witnesses imprisoned into court to testify, I come to that which is emphatically *the citizen's writ of right*, or rather EVERY PERSON'S WRIT OF RIGHT, in cases where he is aggrieved by illegal imprisonment.

The Constitution of the United States has provided that "the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it," and the Constitution of Maine has made the same provision in the same words.

All the United States Courts, and either of the justices of each, may grant this writ for the purpose of inquiring into the cause of commitment, in cases where the prisoner is in custody

under authority of the United States, or committed for trial before some of the United States Courts.

The *habeas corpus act* of Maine is that of 27th February, 1821, ch. 64, and it provides *that any person imprisoned or otherwise restrained of his personal liberty, by any officer or officers, or any other person or persons, for any cause or upon any pretence whatever, he, or any person in his behalf, may complain in writing to the Supreme Judicial Court, or any one Judge in term time, in any county, or any one or more in vacation*; and upon such complaint, and upon view of a copy of the warrant, if any, or upon his affidavit certified by a Justice of the Peace, or the oath of the person applying, or upon the oath or affidavit of a witness so certified, if he lives more than twenty miles distant, that a copy of the warrant has been demanded and denied, the Court and Justices are respectively authorized and *required* to issue the writ, directed to the officer or person restraining the prisoner, returnable, *forthwith*, to the court or judge who awarded it, or any other judge of the court. The exceptions are, of persons committed for treason or felony, or suspicion thereof, or as accessory to the latter before the fact, plainly expressed in the warrant of commitment, or persons convict or in execution by legal process, criminal or civil, or committed on civil process for want of reasonable bail.

The Supreme Judicial Court, *in term*, and any justice in *vacation*, when the circumstances appear to require it, may, moreover, bail any person where and for whatever cause committed, those only excepted who are committed by the Governor and Council, Senate, or House of Representatives, in cases provided by the Constitution.

The writ issued by the court or judge and delivered to the officer or person to whom directed, shall be executed and returned by him, (upon tender of charges of bringing the prisoner when in custody of an officer or in gaol,) and the prisoner shall be brought and delivered, if less than twenty miles distant in *three* days, if more than twenty and less than one hundred, in *ten* days, and if more than a hundred, in *twenty* days, on penalty for refusal or neglect of four hundred dollars, and for a false

return the officer shall be liable to an action for damages ; and the court or judge may further punish as for a contempt, and compel obedience by process of attachment.

Secreting a prisoner, or unnecessarily shifting him from one officer to another, is punishable by a penalty of four hundred dollars to the party aggrieved.

Neglect of the officer having custody of the prisoner, for *six hours*, to give a copy of the precept of commitment, subjects to a penalty of two hundred dollars.

No person discharged by this writ, is to be restrained of his liberty for the same cause, unless he be indicted or convicted therefor, or shall neglect to find bail when ordered by a court of record.

Minors enlisted into the United States Army without consent of parent or guardian, may be released by this writ, by this court, or a judge, or the State District Court.

The court or judge is obliged to examine every case within three days, and may discharge upon bail or otherwise, or remand according to the circumstances of the case, and the laws of the land.

The writ for replevyng a person is analogous to the habeas corpus, but authorizes a trial of the legality of the imprisonment, by a jury of the vicinage.

SECTION VI. — OF MIGRATION.

Every American citizen owes a *two fold*, but not an *adverse* allegiance. It is the price of protection, and is perfectly consistent with the most perfect state of civil liberty. It is due to the *State* for his domestic security,—to the *United States* for his defence and protection from foreign injustice. So long as he remains under this protection, the duties of obedience are reciprocal.

A writer on natural and national law, advances these as the doctrines on *expatriation* :—

A man ceases to be a subject, “ 1st, When he goes to settle elsewhere—2d, when he is banished for some crime—3d, by

conquest of an enemy. It is a right inherent in all free people, that every man should have the liberty of removing out of the commonwealth, if he think proper. But, in general, a man ought not to quit his native country, without the permission of his sovereign; but his sovereign ought not to refuse it, without very important reasons. It would be contrary to the duty of a good subject, to abandon his native country at an unseasonable juncture. But if the laws have determined any thing on this point, he must be determined by them."

The right of expatriation has been often discussed in the courts of the United States, but has never been definitely settled. It has been said by the court that the right existed, but that the time, manner, and circumstances, must be such as not to endanger the peace and safety of the United States, and that it is questionable whether it exists at all, unless it be *authorized by law*. It has been contended that the power of regulating emigration, was incident to that of regulating naturalization, and consequently was vested exclusively in Congress. And it was a remark of one of the judges, "that though the Legislature of a particular State should, by law, specify the lawful causes of expatriation, and prescribe the manner in which it might be effected, the emigration could only affect the *local* allegiance of the party, and not draw after it a renunciation of the higher allegiance due to the United States."

In time of actual or threatened war, no doubt exists, however, of the right to call home all absent citizens, and to impose penalties for disobedience. How far a citizen, having *abjured his allegiance* under the authority of a State law, and become naturalized by a foreign government, could claim the rights of a foreigner against the United States, would be a question involving many perplexing doubts and difficulties.

We have, however, no law of this State or of the United States, forbidding expatriation. While a constitutional power of naturalization is in full operation, it would seem an inconsistency that we should grant to foreigners the immunities of citizens, and refuse to our own citizens the correspondent right to renounce their allegiance. This inconsistency is,

however, very palpable in other governments, especially the British. And so long as other nations hold out encouragements to our citizens to quit our own country and become subjects of theirs, we may very properly enforce upon the people of those nations the same principles. Still, though this may be right in regard to these nations, it may be very different in respect to the right of locomotion of the citizen himself. Except in extraordinary cases of national exigency or danger, our people should have perfect liberty to select their own country, and it would be well, therefore, that Congress should regulate the right of expatriation as well as that of naturalization.

SECTION VII.—OF OCCUPATION.

The law abhors *idleness*. It is the parent of crime. For when the devil finds a man idle, he always sets him at work. Several laws of the State have been enacted against idleness and its attendant and consequent vices. Each county is obliged to provide a *house of correction*, and until this is done, the county gaol is to be used for the purpose, and the following descriptions of persons, on conviction, may, by the State District Court or a justice of the peace, be sentenced there and compelled to labor:—

1. Rogues, vagabonds, and idle persons going about in any town or place in the county, begging.

2. Persons using any subtle craft, juggling, or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies, or fortunes, or discover where lost or stolen goods may be found.

3. Common pipers, fiddlers, runaways, common drunkards, common night-walkers, pilferers, wanton and lascivious persons in speech, conduct, or behavior.

4. Common railers, or brawlers, such as neglect their callings, or employments, mispend what they earn, and do not provide for themselves or the support of their families.

Towns are authorized to erect work-houses—the overseers of which may commit, 1st, all paupers relieved by the town; 2d, all able bodied persons, without means, who neglect or refuse to maintain themselves; 3d, those who live a dissolute, vagrant life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood; 4th, all who have some rateable estate, but not sufficient to render them liable to pay any tax for their property equal to two thirds of a poll tax, and neglect the due care and improvement thereof; 5th, such as spend their time and property in public houses to the neglect of their business; 6th, those who, by otherwise mispending what they earn to the impoverishment of themselves and their families, are likely to become chargeable to the town or State.

The following descriptions of persons may be put under guardianship, to be managed in their persons and property as *non compos* or *lunatics* :—

Those who by excessive drinking, gaming, idleness, or debauchery, shall so spend, waste, or lessen their estates, as to expose themselves or families to want, or endanger the town, in the opinion of the selectmen, to charge or expense.

The application is to be made by the selectmen to the Judge of Probate, who, on due notice, may appoint the guardians.

All transfers of estate by the spendthrift, after filing a copy of the complaint and order of the Judge of Probate with the registry of deeds of the county, are void.

This provision is unknown to the English law, and is probably borrowed by us from the Roman.

How it is, that under a Constitution which provides that “no one shall be deprived of his *life, liberty, property, or privileges*, but by the *judgment of his peers*, or the law of the land,” the person or property of a citizen should in this summary way be placed under the care, management, and control of another, demands a doubt; especially, as “the law of the land” cannot authorize a trial thus affecting his *person or property* but by jury.

These laws, however, embrace the idle and dissolute only, and the right of locomotion is not restrained, nor is the place, time, or character of any lawful occupation prescribed by law. The right to exercise any trade or occupation, at any time, place, or manner, without annoying others, is enjoyed by us, more than by any other people.

CHAPTER FOURTH.*

PRESERVATION OF LIFE.

The right of defending *life* is declared, by the Constitution, to be "*natural, inherent, and unalienable.*"

The laws have a special regard to human life. It should never be taken but in cases of extreme necessity, and it is, indeed, denied by many that the community has a right to take the life of a human being for *any* crime. But, as the Constitution of the State recognizes the right of every man to defend his own life, it would seem to follow that the laws might authorize the taking life to preserve life, where life could not be otherwise preserved.

* Const. Maine. Laws of Maine. Const. and Laws U. S. Chitty's Blackstone. Hume's England. Bible. Rollin's Auct. Hist. Anacharsis. Gibbon's Rom. Empire. Stanton's Chinese Code. Ed. Encyclop.—titles, Egypt and Persia. Bentham's Letters and Treatise. Howell's State Trials—Sir S. Homilly. Sir Robert Peel's Bill.

SECTION I.—THE RIGHT TO INFLICT CAPITAL PUNISHMENTS.

The precept of the Divine law which was promulgated soon after the flood, that "*whoso sheddeth man's blood, by man shall his blood be shed,*" would seem to be universal. But it has been strangely perverted by the opposers of capital punishments, by extending this prohibition to the officer who executes the law. If the executioner who sheds "blood" is to forfeit his own life, *his* executioner must incur the same forfeiture, and so on in succession *to the last*. It is a paradox, which forbids and enjoins the same thing. The plain meaning of the precept is that *the murderer is to suffer death*, and such has been the understanding in all civilized nations, ancient and modern. Whether this precept of the Divine law extends to all societies and conditions of men, in all time, is matter of doubt. But be this as it may, there is no possible reason that it should be understood as *prohibiting* capital punishments.

It is contended, that, as God gave life, man cannot take it away, and that we can, therefore, enter into no compact by a violation of which we forfeit our own lives. The proposition, if it proves any thing, proves too much. *Liberty* is as much the gift of God as *life*, and comprehends all that makes life worth having, and yet we punish by imprisonment for life. We kill our enemy in war, to prevent his killing us, and in this we undertake to judge for ourselves of the danger and the necessity. But, in the case of the murderer, the *State* judges of both, and it determines that a just regard to human life requires that the murderer shall die. One of the objects of man, and a most important one too, in entering into society, is the preservation of *his own* life. This preservation is guarantied, on condition that he do not destroy the life of another. But if he sheds man's blood, by man his blood is to be shed. He

can pledge his life for protection, *on condition*, and if he violates the condition, he forfeits the pledge.

The argument proves too much in this too, that man has, upon this hypothesis, no right to defend himself by killing his assailant, and the "natural, inherent, and unalienable right," guaranteed in the Constitution, of defending life, is no right at all, as you must wait to see if the assailant will kill you, before you undertake to kill him.

Capital punishments have been denounced as a relic of barbarism. This is an error. Barbarism *compromises* crime.

According to Tacitus, the custom of *weregild*, or compensation for murder, was universal among the Germans.

By the Irish *brehon* law, the judge, in case of murder, compounded between the murderer and the friends of the deceased. The recompense was called *criach*.

Under the old Saxon laws, (those of Ethelstan) the *weregilds* for homicide were graduated in progressive order, from the death of a *ceorl*, or peasant, even up to the king himself.

In the Turkish empire, there are no public prosecutors. In case of murder, it is the business of the next relations to avenge the death of their kinsman, and if they rather choose (which is generally the case) to compound the matter for money, nothing more is said about it.

By the Hebrew law, murder, as well as many other crimes, was punished with death.

Egypt of old was celebrated for its wisdom, and the learning of that country attracted to its schools the wise and inquiring of other nations. The principles of justice, as it is said, appear to have been defined with considerable attention, and the laws of the country fairly dispensed. "Every individual, from his infancy, was nurtured in the strictest observance of the laws." A new custom was a kind of miracle. "No nation ever preserved its laws and customs longer." Murder and perjury were punished with death; and the false accuser was condemned to undergo the punishment which the accused was to have suffered, had the accusation been proved. It would seem, from an incident in scripture, that the punishment of death was by *hanging*.

In *Persia*, murder is punishable with death; but among the *wandering tribes*, the murderer, when the crime is proved, is given up to the heir of the deceased, who may either forgive, take the price of blood, or put him to death. The accused, in *Persia*, has a right to meet his accuser face to face, and false accusers suffer the punishment charged. Darius,* the son of Hystaspes, (the Ahasuerus of scripture) gives us a fine application of this principle, in the case of Haman and Mordecai.

In *China*, the life of man is held peculiarly sacred, and murder is never overlooked, except *infanticide*, against which there is no law. The execution is by beheading. The criminal code (a translation of which was obtained by Sir George T. Staunton, Secretary to Lord McCartney) is exceedingly particular; the crimes are well defined, and the punishments graduated, *generally*, according to the guilt.

At *Athens*, Solon, though he repealed most of the laws of Draco, which are said to have been written in blood, still preserved that against homicide unrepealed, and it was afterwards enforced by the tribunals, where the name of Draco was never pronounced but with the veneration due to the benefactors of mankind.

It is said of Lycurgus, that "he began by travelling to Crete, whose hard and austere laws were very famous; from thence he passed into Asia, where quite different customs prevailed; and last of all he went into Egypt, which was then the seat of science, wisdom and good councils." His laws punished murder with death.

No modern nation has abolished capital punishments for murder. The instances of Russia and Tuscany have been frequently alluded to, but the facts, in both cases, remain to be established, and even if they were, the character of those people, *at the time*, as civilized nations, might well be questioned. Russia, it is believed, entertains, at this day, not much horror at the shedding of human blood for crimes; and if Tuscany,

* Perhaps Artaxerxes.

with its factions and family animosities, has succeeded to prevent, or even *restrain* murders and other atrocities, it requires stronger proofs than those hitherto adduced.

SECTION II.—THE EXPEDIENCY OF CAPITAL PUNISHMENTS.

The object of punishment is the prevention of crime. Capital punishment is an evil, as it inflicts the pain of death on a fellow being. But murder is a greater evil, as it deprives the community of a faithful member, and inflicts the pains of death upon its victim, *unprepared*. If the crime can be as well prevented by other punishment, this should never be resorted to.

But the fear of death *deters* more than that of any other punishment. Imprisonment for life, which is offered as the substitute, is terrific, indeed, and to some, perhaps, equally so as death. But in most cases, it is different. The terrors of death, are the great guardians of life. Death is dreaded, even by the aged, whose hold upon life is slender, and whose hopes of future happiness are strong and confident. It is painful and agonizing, as it separates soul and body; it is melancholy and dejecting, as it is the conclusion of the present life, and thus terminates all our earthly hopes and prospects; it is awful and alarming, as it is the entrance into a new and untried state of existence.

It would be thus to the murderer, even if, in his view, all beyond it is an eternal sleep, or an *uncertain existence*, about which conscience has long since ceased to trouble him. To be sure, the murderer knows that if he suffers imprisonment for life, he must die at last. Still, he entertains hopes of escape or pardon, and will hold on to a miserable existence, rather than encounter this king of terrors. Man will endure a lingering moderate pain, rather than a momentary excruciating suffering. He procrastinates, and is never ready—he knows he must die,

and still he acts as if he were to live forever. The pleasures of the world are always in prospect, and such are their delusions that few give them up until death is certain.

Most men can moralize and philosophize on the vanities of the world—how vain and transitory are all things—still, they hope even against hope, and cling to life to the last. But after all, it is this entrance into a new state of existence, that most appals. The professed infidel is not always steadfast—he may affect to be so, still he will waver, and at times inquire the consequence, should he be mistaken.

If the murderer ever reflects—ever “*counts the cost*”—a *hereafter* comes into the calculation as no small item. It is in vain to pretend that he is reckless of consequences, else why does he attempt to escape? And if he does so attempt, would not his desire be in proportion to the magnitude of his danger? Indeed, the single fact that those who have been under sentence of death, should be earnestly solicitous for a commutation of imprisonment for life, is strong proof that capital punishment is most dreadful of all. Hence, also, in those countries where for robbery the punishment is death, robbers always murder; where it is less, the person robbed is seldom murdered.

SECTION III.—THE CRIMES WHICH SHOULD BE CAPITALLY PUNISHED.

Punishments should be proportionate to the crimes, and, so far as is consistent with justice, should savor of *retaliation*. Not that punishment should ever be inflicted in *revenge*, but the public see a certain aptitude in imposing pain or distress in the punishment similar to that which was caused in committing the crime. Hence the old rule “an eye for an eye and a tooth for a tooth,” however unjust it might prove in its application in particular cases, would, nevertheless, meet with a favorable reception from a great portion of mankind. That the false

accuser, also, should stand in the stead of the accused, is a principle of the same origin and character, and would be likely to meet with the same reception.

It is important, moreover, that there should be nothing in the punishment unnecessarily cruel or sanguinary, else public sympathy will overcome justice, and the guilty will consequently escape.

Death for murder is a punishment at the same time proportionate and adapted to the crime.

Arson, or burning a dwelling-house in the night, is punishable with death. If any atrocity can deserve exemplary punishment, and of the highest severity, it is this. To set fire to a peaceful mansion in the night, when sleep has disarmed the occupant, and left him unguarded and unprotected, does indeed bespeak "a mind devoid of social duty, and fatally bent on mischief."

In these high and aggravated offences against the lives and habitations of the citizens, the accessories before the fact suffer the same punishments as the principals.

Treason against the State is a capital offence, though it is very doubtful whether "levying war against a State, adhering to its enemies, giving them aid and comfort," must not necessarily be treason against the United States, and punishable as such in their courts. It is believed that no indictment for treason, since the adoption of the federal Constitution, has been sustained in any State court. Exclusive of this crime, therefore, and those few that arise under the rules and articles of war, in case of *State troops*, the State of Maine recognizes *but two* crimes punishable capitally. And when we reflect, further, that even in these cases, the Executive may pardon absolutely, or commute for imprisonment for life, our criminal code cannot be accused of being very sanguinary.

The people of this State, however, owe a further allegiance to the United States, and are punishable for crimes committed against their authority. Those crimes punished capitally under the laws of Congress, in addition to those above-mentioned, are:

Treason, already defined. Such, however, is the attach-

ment to the laws and Constitution, that treasons have been rare indeed, few convictions have been had, and no punishment has been inflicted since the Government was organized. No case has occurred, it is believed, within Massachusetts or Maine, even of a prosecution.

Piracy. This is a crime of too frequent occurrence, but it is believed that no trial has been had in this State. Under this head, may be classed the slave trade, and casting away or otherwise destroying ships and vessels on the high seas.

Rape, is also, by the United States laws, a capital crime.

Robbing a mail-carrier a second time—or, if in effecting the robbery the first time, the offender wounds or puts life in jeopardy by a dangerous weapon.

These are all the capital punishments known to our laws, except those provided for the Army and Navy.

The objection that the severity of the punishments would prevent convictions, will scarcely avail, when we reflect that there is no disproportion between the punishment and crime, which in any case would excite a sympathy; especially as the President, as well as the Governor, is endowed with the power to reprieve and pardon.

SECTION IV.—MEANS OF SELF DEFENCE.

A free citizen, if he demeans himself peaceably, is not to be disarmed, watched, or guarded. The Constitution of the State has provided that “every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned;” and “that no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, or occupant, nor in time of war, but in a manner to be prescribed by law;” and similar rights are guarantied in the Constitution of the United States. Thus are the rights of self defence guarded and secured to every one who entitles himself by his demeanor to the protection of his country.

There are few instances, however, where any one *within this State*, finds it necessary to go armed in his own defence. Such an act would almost bespeak the person a *madman* or a *malefactor*.

CHAPTER FIFTH.*

REPUTATION.

In all civilized countries, under whatever kind of government, reputation is invaluable. Without it, life itself is a miserable tenure. But it is of especial importance under a government of freedom, where every individual may aspire to the highest office. Liberty of speech and of the press are, to be sure, essential to the existence of a free government. But, in proportion as these are protected, their licentiousness should be guarded against, that reputation may not be made the victim.

SECTION I.—SLANDER.

Slander is defined to be “the publishing of words in writing, or by speaking, by reason of which the person to whom they relate becomes liable to some corporal punishment, or to sustain some damage.

* Chitty's Blackstone. Const. Maine.

I. For slander by words spoken. The only remedy is by action to the party injured.

1. The first class of actionable words is those which import the charge of a crime. In this case, the charge must be precise, or have an allusion to some prior transaction, that the hearers must necessarily have understood that the slanderer meant to impute to the plaintiff some punishable offence. Imputation of an *intent* to commit a crime is not actionable.

2. To impute a contagious disorder to a man is actionable, as tending to exclude him from society. But to charge him with *having had* such disease, is not actionable, as this would not have such tendency.

3. Words, too, are in themselves actionable, which impute to a man unfitness for any office of profit or emolument, which he holds. And it is said that an imputation of an *intent* or *inclination* to commit a criminal breach of duty, in such an office, is actionable.

4. So, words which impute a want of integrity or capacity, in the conduct of a trade, profession or occupation. If defamatory words are spoken of two persons, affecting them in their joint trades, they may join in an action for the injury.

5. Special damage may sustain this action, where the words spoken were not actionable in themselves; as to charge a minister of the gospel with *incontinence*, WHEREBY he lost his parish. But the special damage must be a certain and actual loss, and *the consequence* of the slander.

II. LIBEL, in its most extensive meaning, signifies any malicious defamation, expressed either in printing, writing, pictures, or effigies. There is this distinction between verbal and written slander, that the latter is not less actionable for not imputing a crime punishable by the courts; for any written slander, though merely tending to render the party subject to disgrace, ridicule, or contempt, is actionable, though it does not impute any definite punishable crime—such as to write that a person is a swindler or hypocrite.

With regard to *libels*, in general, there are two remedies, one by *indictment*, and the other by *action*. The former for

the public offence, the latter to repair the party in damages for the injury done him.

Every libel is a public offence, from its tendency to provoke the person libelled to a breach of the peace. And, by the common law, the offence is the same, whether the words be true or false. But, by the Constitution of Maine, it is provided that "in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, *the truth thereof may be given in evidence*; and in all indictments for libels, the jury, after having received the direction of the Court, shall have a right to determine the law and the fact."

It is also provided, by the act of this State of the 2d March, 1833, that in every prosecution for writing and publishing any libel, it shall be lawful for any defendant, upon trial of the cause, to give, in evidence, in his defence, the truth of the matter charged as libellous; and the truth of such matter being established, the same shall be held a complete justification, *unless it shall be made to appear that the matter charged as libellous originated from corrupt or malicious motives*.

SECTION II.—MALICIOUS PROSECUTION.

Another way of destroying a man's reputation is by preferring malicious indictments, or prosecutions against him. The law does not, however, hold the prosecutor answerable for a conviction; otherwise crimes would go unpunished from an unwillingness in prosecutors to incur responsibility. But it often happens that prosecutions under the mask of justice and public spirit, are made the engines of private spite and enmity. For such, the law has given a very adequate remedy in damages, either by an action of *conspiracy*, which must be brought

against two at least, or, which is the more usual way, by an action of the case for a false and malicious prosecution.

To sustain this action for a *criminal* prosecution, it is necessary to prove, 1st, the falsehood of the charge; 2d, want of probable cause for instituting it; 3d, malice in the prosecutor; 4th, damage to the accused. Malice, however, may be *inferred* from want of a probable cause.

For maliciously prosecuting a *civil* cause, it is necessary to prove, 1st, falsehood of the demand; 2d, want of probable cause; 3d, malice in the defendant; 4th, damage by arrest or imprisonment. But, as in a criminal prosecution, malice would be *inferred* from want of a probable cause.

CHAPTER SIXTH.*

EDUCATION.

Among the rights and immunities of a people which are merely *personal*, there is no one more important than that of *education*. It is *the mind* which graduates *the man*. He would, but for this exalted faculty, be inferior to the brute. In all our vagaries on the equality of men, we have never applied *the level* to the human mind. A struggle for superiority in this, has seldom occasioned alarm, and it is believed that to discourage a competition in the race of intellect, would indicate a depravity which few would confess and none would envy.

In governments founded on and sustained by *force*, a general diffusion of knowledge has, perhaps, been deprecated. To teach a portion of the community *that discipline* only, which would make them good *soldiers*, and the rest *that obedience* which should make them good *subjects*, is all the education which a despotism might require. Still, as nations bear such relations to each other, and as intelligence is to each a tower of strength, each must, in its conflicts and competitions with others, rely on this strength. To do this, the science of government must be learnt, and with it, all its kindred sciences. And when education is begun, it is difficult to confine it to a privileged class. Talent will rise up in a cabin or a cottage, and eclipse the luminaries of the palace or the throne. The unnurtured growth of genius will surprise and dazzle, and the charms of science and literature will become contagious. The tendency of a general diffusion of knowledge is, to be sure, to favor a free government. Still, despotism cannot safely

* Const. and Laws of Maine. Rules S. J. C. of Maine. Rules S. C. U. S. College charters and by-laws.

check its course, and the most it can do is to tame and temper the Hercules whom it cannot chain.

In *republics*, education has been always considered of vital importance to the existence, and perpetuation of liberty. The Spartan youth were adopted as the children of the republic, and educated as such at the public expense. This principle has in some sort been adopted and pursued by our puritan ancestors of New England. The early provisions for education, and the reasons for it, indicate their high sense and strong conviction that knowledge and virtue are the stability of a free government.

The Constitution of Maine has made it imperative on the Legislature to provide for the education of the youth, as a duty of the last importance. It declares that "a general diffusion of the advantages of education is essential to the preservation of the rights and liberties of the people"—and it provides that "to promote this important object, the Legislature are authorized, *and it shall be their duty* to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; *and it shall further be their duty* to encourage, and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges, and seminaries of learning within the State," with a proviso, prohibiting donations or endowments to any literary institution over which the Legislature has no control.

To make it imperative on towns, at their own expense to provide for primary schools, was in many respects preferable, by far, to the establishment of *school funds*. People will be more prompt to take advantage of privileges which they themselves provide, especially when the advantages are felt to follow the expense. In this way, too, it is seen, that though the poor man contributes his means for the education of his children, yet the wealthy comes in aid of his exertions, and stimulates him to avail himself of the benefit.

It has been, indeed, doubted whether school funds, public or private, produce the benefit which they promised. Some have insisted that the scholar should pay for his teaching;

others, that charity, public or private, should do all. Our system pursues neither course. It is this—that *the wealth and labor, in each town, &c., should educate the youth, and that the poor and rich should equally reap the advantage.*

SECTION I. — PRIMARY SCHOOLS.

If every impression on the infant mind through the avenues of the senses, is *instruction*, we must almost admit (as some contend) that talents and intellectual endowments are attributable exclusively to *education*. But inasmuch as the organization of every one, is more or less imperfect, and as every defect of the organs must have an influence on the mental powers, we must adopt the conclusion to which all experience brings us, that though education does much, very much,—still it, in its broadest sense, *cannot do all*. As this is the case, and as it is very certain, moreover, that no two persons can, by any possibility, have exactly the same means of acquiring education, we shall always find the degrees and variety in mental powers, which the combined influence of organization and education produce.

Though the organs of sense may be improved, yet the great subject of improvement is the mind. It is this that exalts man above all other sensitive existence, and makes him ruler over all.

At what age it is proper to fix the attention of children to regular study, it is not easy to determine. So much depends on their health, articulation, and apprehension, that the discretion of judicious parents or guardians is, in this respect, the best guide. But learning must approach them, at first, in the most alluring forms. That restraint which is indispensable, if inconsiderately imposed, may give children a distaste to the first essays of instruction. But it is not *the restraint*, so much as *the manner* of imposing it. Once convince a child of your

kindness and your solicitude for his welfare and happiness, and he will endure any self-denial rather than incur your displeasure.

We may begin very early, likewise, to imbue the infant mind with the obligations of morality, and the duties of religion. But this should be done with much prudence and caution. We should not too soon attempt to explain the incomprehensible attributes of Deity, lest we confound and darken the mind which we attempt to illuminate. Religion, moreover, should be always presented in a form the most lovely, cheering, and inviting. It should never assume the frown of austerity, nor be armed with the terrors of vengeance.

In New England, and especially in Maine, the first dawn of the light of reason imparted to the infant mind, is from *the mother*. The delightful employment of teaching the young idea how to shoot, is conferred on her whose whole soul is involved in the welfare of her charge. Nothing is hazarded to the carelessness, caprice, or treachery of mercenary nurses, who might "while away" their task, with a chief regard to their own comfort and pay. The nutriment for the body and the mind, which nature designed, are afforded by the mother, whose tender solicitude grows stronger and stronger, until habit becomes the handmaid of nature, and every infant developement of talent and virtue is observed and encouraged with pleasure and pride.

But to leave the infant too long in the exclusive care of the parent, would make it the victim of excessive indulgence, and to withdraw it from parental protection and kindness and confide it to the government of a stranger, might expose it to danger from an opposite extreme. Children, when very young, should be taught, therefore, under the eye of parents and guardians; and schools of primary instruction should be established as near to their dwellings, as the state of the country and its settlements permit.

The winters, in Maine, are long, and the weather is severe; and in a country of sparse population, few very small children could obtain the benefit of instruction in this inclement season. This is a season, however, when the laboring classes find less employment, and when their larger children can be better

spared. It is readily perceived, therefore, that the first rudiments should be inculcated in summer, and a more advanced course of instruction in winter.

It has been deemed advisable that the first course should be chiefly entrusted to females, if these can be found capable of instruction. An infant school has been found to be much better regulated, and much more successful, when taught by females. There is something in the female character much more congenial to infancy, and much better suited to direct and discipline the infant mind. The character too, when first developing, is sooner discerned by the penetration and sagacity of a well bred and well taught woman.

SECTION II. — SCHOOL FUNDS.

The acts of the 15th March, 1821, and of the 11th March, 1834, are *the basis* of our primary school funds.

They require that every town shall annually raise and expend, for the maintenance and support of schools therein, to be taught by school-masters duly qualified, a sum of money, including the income of any incorporated school fund, not less than *forty cents* for each inhabitant—to be distributed in the several districts in the town, according to the number of children between the ages of four and twenty-one; provided, that not exceeding one third may be applied, if the *district* so determine, to a school to be taught by a female—or, when the sum so raised shall not exceed thirty-five dollars, the whole may be so applied. And the school committees may, on request of the inhabitants, allow more than the one third to female instruction; and when part of the money is to be expended by male and part by female instruction, the legal voters of the district may, by their own vote or by committee, determine the description of scholars which may attend each school. The numbers are to be ascertained by the last census upon which the representation in the Legislature is based. If, as it is calculated, the next regular enumeration, in 1840, will give Maine 500,000

inhabitants, the sum to be thus raised and expended will be \$200,000, equal to the interest, at six per cent., of a school fund of \$3,333,333 33. Towns neglecting to raise and expend the sum required, forfeit not less than twice nor more than four times the deficiency, to be applied for schools, and if not so applied, may be recovered of the town for the use of the prosecutor. This is not merely a fund *on paper*—a compulsory provision disregarded; so far from it, that though it is made the duty of grand jurors to make presentment of all cases of neglect which come to their knowledge, very few indictments have been found, and none contested. Indeed, there are few towns in the State which do not raise and expend more than is required by law.

In addition to this provision, the State has granted the tax on banking corporations, of one per cent. on their capital stock, and amounting to from \$35,000 to \$40,000 per year, to be appropriated to the same object.

They have granted, moreover, *twenty townships* of land, the income of which constitutes a fund for primary schools. None of this grant is yet available; but the sums to be realized from the sales will, with the other provisions, constitute a fund, the interest of which will, if prudently and properly dispensed, be quite adequate to all the exigencies of primary instruction.

The bank tax and the land fund are to be distributed among the towns, according to the number of scholars in each, between the ages of four and twenty-one, and in each town it is to be distributed among the several school districts in the same proportion.

The system, then, is briefly this. The taxation is on real and personal property, with a small portion on labor, under the denomination of a *poll* or *capitation* tax. The *wealth* and *industry* furnish the fund, and the expenditure is upon the education of the children, according to the number to be taught.

We see, at once, the reason why there is never any reluctance in raising the sum required by the law. *The majority of the voters receive more than they pay.* The rich educate the poor. And as the poor are most numerous, and generally

have more children in proportion to their numbers, the school tax is always voted without any trouble or difficulty.

In every thing which regards schools, *plantations* have the same powers as *towns*, and their *assessors* stand instead of *selectmen*.

SECTION III.—SCHOOL DISTRICTS.

Each town and plantation is sub-divided into as many school districts as is most convenient for instruction, having regard to location and population. This is done at the annual meeting, in March or April, when the town and plantation officers are elected, and other corporate business is transacted.

These districts are made special corporations, and may elect their officers. They may sue and be sued in their corporate capacity—may take and hold any estate, real or personal, for the purpose of schools, and apply it as other school money, and in addition to their proportion of the money raised by towns and plantations. Districts may be formed from one or more towns, and the proportion of money be assigned by the respective towns to which they belong, and the officers of the *oldest* shall exercise the requisite powers.

The districts, upon notice prescribed by law, may raise money for erecting, repairing, purchasing, and removing school-houses, and for purchasing utensils and appurtenances, and the necessary land. They may determine where the school-houses shall be located, at what age the children shall be admitted, and whether from other districts or towns, and instruct the agents at what time the schools shall commence.

They may, by permission of the town, choose their own school agents, which are otherwise chosen by the town. When five or more legal voters in a district apply to the agent for a meeting, he is obliged to warn it. A like duty devolves on the selectmen and assessors, when applied to by three or more of such voters.

If the district shall, by a majority of votes, refuse to raise money for the purposes herein mentioned, the selectmen of

the town may, on the application of five freeholders of the district, insert in their warrant for their next town meeting an article containing a proposition to raise the money; and if the town shall so decide to raise it, it shall be assessed on the district, and collected as other taxes.

It requires the concurrence of three fourths of the legal voters to locate a school-house, and two thirds to remove one already located. And when these majorities cannot be obtained, the selectmen may, on application of two or more voters of the district, determine the location; or a committee of the district, appointed to superintend the building, &c., may determine. If the district will not appoint the committee, the power is vested in the selectmen, and if the committee appointed by them refuse, the selectmen themselves may act as such committee.

Provision is made where the inhabitants of an island cannot be conveniently included in a school district, and the number is too small to compose one of itself, that the assessors may assign to the inhabitants their proportion of the school money, according to the number of scholars, to be expended under the direction of the school committee. Portland and other *cities*, have special provisions, varying from the general laws, but not essentially.

SECTION IV.—SCHOOL COMMITTEES.

This is, perhaps, a defective part of our system of primary education. We recur to the examples of Prussia and France, but these form no parallel. We have no *Normal seminaries*, for the qualification of instructors merely. Our system of education is limited to the State; theirs is a national concern. Our directors and managers are annually elected by the people; theirs hold their offices by appointment from the supreme authority. In Prussia, the committees take cognizance of all that concerns the school, within and without. They receive all complaints, which they transmit to the superior authorities.

They see that all is conformable to regulation. They are to animate, direct, and counsel the instructors, and to excite the zeal of the inhabitants for education; and they can *compel* parents and guardians and masters to send their children to the schools.

In Maine, there is to be chosen at the annual meeting in each town, a superintending school committee, to consist of not less than *three* nor more than *seven*, who are to be sworn to their fidelity. Their duties are—

To visit and inspect the schools in the several districts in the town, and to inquire into their regulations and discipline, and the proficiency of the scholars, and to use their influence that the youth attend the schools.

They have power to dismiss teachers, notwithstanding they may have the legal credentials.

They may expel “obstinately disobedient and disorderly scholars,” and may afterwards restore them.

They may direct what school books shall be used in the schools.

They may fill any vacancy in their number.

And it is made their duty to make a written report at the annual meeting of the standing and progress of the scholars, and the success which has attended the mode of instruction and government of the respective teachers.

One or more of the committee is to visit each school twice during the term it is kept—once within *three* weeks of its commencement, and once within *two* of its close.

No one is permitted to instruct without the certificate of the committee of his qualifications, superadded to that of some person within the State, of liberal education or literary pursuits and good moral character; and a certificate also of character from the selectmen of his town.

Whether that these committees serve without pay, or that they are injudiciously selected, certain it is that many are employed as teachers, who are totally incompetent for the task; and in too many instances, of characters very unfit for examples to children and youth. The duties of these superintending com-

mittees are very important, and some legal provision should be made to induce or compel them to the performance of them.

No power is given to compel parents or guardians to send their children to school. But in the power given to overseers of the poor to bind out children of paupers as apprentices, it is made their duty to provide in the indentures, that they, if males, shall be instructed to read, write, and cipher, and if females, to read and write.

SECTION V.—INSTRUCTORS.

To qualify an instructor for the primary schools, he must be a citizen of the United States. He must be well qualified to teach in reading and writing the English language grammatically, and in arithmetic and other branches of learning usually taught in public schools. He must be a person of sober life and conversation, and of good moral character, and he must, to all this, produce the credentials mentioned in the last section.

A female teacher must produce the certificate of the school committee that she is suitably qualified to teach the English language grammatically, and the rudiments of arithmetic, and evidence of her good moral character.

Every person who teaches without the testimonials required, forfeits a sum not exceeding the daily wages, and is barred from recovering any pay for teaching.

The law requires, “that it shall be the duty of the Presidents, professors, and tutors of colleges, and the preceptors and teachers of academies, and all other instructors of youth, to take diligent care and exert their best endeavors to impress on the minds of children and youth committed to their care and instruction, the principles of piety and justice, and a sacred regard to truth, love to their country, humanity, and universal benevolence; sobriety, industry, and frugality; chastity, moderation, and temperance—and all other virtues which are the

ornaments of human society. And it shall be the duty of such instructors to endeavor to lead those under their care, (as their ages and capacities will admit,) into a particular understanding of the tendency of the before mentioned virtues, to preserve and perfect a republican constitution, and secure the blessings of liberty, as well as to promote their future happiness—and the tendency of the opposite vices to slavery, degradation, and ruin.” These requirements are all very good, however strangely and crudely they are thrown together.

It seems that the scriptures are not directed to be read or taught in our schools and seminaries. The instructors of our youth, however, if they would teach well and faithfully these several duties of *piety, temperance, chastity, industry, frugality, patriotism, and benevolence*, should be able to teach by *example* as well as *precept*; and the man or woman who practises all these, must necessarily be religious. But be this as it may, it is certain that the scriptures are read and taught in all our schools, and no teacher would for a moment be tolerated who was not a firm believer in the truths of revelation.

SECTION VI.—DUTIES OF SELECTMEN AND OTHER OFFICERS IN RELATION TO SCHOOLS.

Teachers are to notify parents, masters, and guardians, if students are not provided with the requisite books; and if they neglect to furnish them, the selectmen, on notice by the teachers, shall furnish them at the expense of the parent, master, or guardian, to be assessed and collected in his next tax.

Lands are to be taxed in the districts in which they lie, and for all district expenses the taxes are to be assessed on the inhabitants of the district, as other town taxes are on the inhabitants of the town, and the assessors are to assess and the collectors to collect in the same manner, and the treasurer has the same powers to enforce payment.

The selectmen are to make returns annually to the Secretary of State, of the number of the school districts within their respective towns, the number of children within each between the ages of *four* and *twenty-one*, and the number who usually attend school, and the amount of money raised and expended; designating what part is raised by taxes, and what from funds, and how such funds accrued—what time the school may have been kept annually in each, how much by males, and how much by females.

Penalties are imposed on towns, selectmen, and others, for neglect of the duties prescribed by the school laws—the collection enforced and the avails distributed for the benefit of schools.

SECTION VII.—PRIVATE INSTRUCTION.

Besides these schools of primary instruction, there are others established by the voluntary associations and contributions of individuals. These are—

First, *Sabbath Schools*, where the children and others assemble together a portion of every Sabbath, (usually in the morning before the worship begins) to receive instructions, and recite lessons from the scriptures. These schools are under the superintendence of a teacher of religion, or some other well read in the scriptures, who, by the aid of instructors, inculcates upon the pupils the divine precepts of holy writ.

Second, *Private Schools*, that is, all such as are supported by the voluntary contributions of individuals. These are for different grades of instruction, and are chiefly for the benefit of the children of the contributors. They pass under the denominations of "*private schools*," "*high schools*," "*boarding schools*," "*private academies*," &c. &c.

The number of scholars which usually attend and receive the benefit of the public provision is about *one fourth* of the

whole population. The portions of the year in which each student receives the benefit of the instruction, depends upon a variety of circumstances and exigencies. It is probable, however, that, including the whole number, four months instruction in a year, to each scholar, would be about a fair average.

SECTION VIII. — ACADEMIES.

These are incorporations for purposes of instruction, under the direction of *trustees*, who also manage the *funds* of the institution. These funds are composed of private donations and public grants, one or both; but there has always been a reluctance to endow these academies, upon the grounds, chiefly, that they are calculated for the benefit of the wealthy, and detract from their influence in behalf of the primary schools. The Constitution, however, requires that the Legislature shall, from time to time, endow them; and, as a substitute for the Normal schools of Prussia and France, as well as for other reasons, these institutions ought to be patronized. There are now of these academies, including those bearing different names, such as *seminaries*, *theological institutions*, &c., between thirty and forty in the State. Some are well conducted and flourishing, but most of them are languishing for want of funds.

SECTION IX. — COLLEGES.

By this term we understand a society of persons engaged in the pursuits of literature, including the officers and students. A *University* may include an assemblage of *Colleges*, but its usual acceptance is a universal school, in which are taught all the branches of learning, or the several faculties of theology, medicine, law, and the arts and sciences.

In Maine there are two Colleges only—*Bowdoin* and *Waterville*. They are established upon funds of individual donations and public grants, and each was incorporated by Legislative acts of Massachusetts, before Maine had become an independent State. The government of the first is vested in a board of trustees and a board of overseers—each having a negative upon the other. The President of the College is President of the trustees, and the Governor a member, *ex officio*. The number of this board is never to be less than twenty, nor more than twenty-five—thirteen to constitute a *quorum*. The overseers are to be not less than forty-five, nor more than sixty—fifteen a *quorum*.

The executive government consists of a President, professors, tutors, treasurer, and librarian. The library is in its infancy, but the selections are good, and the number of volumes, including the students' library, is about 15,000.

A Medical School, attached to the College, was established in 1820.

Waterville College is under the government of a single board of trustees; and the executive government vested in a President, professors, tutors, treasurer, and librarian, similar to that of *Bowdoin*.

Students are generally prepared for admission to these Colleges, in some of the academies, or institutions of intermediate grade. They must have been taught the English, Greek, and Latin grammars, and selections from the best Latin writers in poetry and prose, and the Testament and other selections in Greek; in writing Latin, in geography, and in arithmetic to a certain extent.

The studies in the Colleges are principally the *English* and *dead languages*, *Rhetoric*, *Logic*, *Mathematics*, *Philosophy*, *Chemistry*, *Mineralogy*, *History*, *Theology*, *Metaphysics*, and *Natural and Political Law*. Of the *modern languages*, the *French*, *Italian*, *Spanish*, and *German* are occasionally taught.

The students are divided into four classes—the term of each expiring every year. Each graduate, if found qualified, is, at the expiration of four years, entitled to his diploma for a degree of "BACHELOR OF ARTS."

SECTION X.—PROFESSIONAL EDUCATION.

1. *Theological.* Our religious teachers are of all sects, and of all grades of instruction. As every one has a right to worship in his own way, and to select his own teacher, it is not strange that we have *pretenders* in this as in all other professions. But the notion that *inspiration, without education*, is enough for a preacher, is fast wearing off, and our teachers find that they themselves must be first taught. And we find that most of our preachers, of whatever denomination, have been students in the profession at some College or Theological Institution, or with some learned and experienced minister.

2. *Medical.* The Medical School, established by an act of the Legislature, of 27th June, 1820, is under the direction of the trustees and overseers of Bowdoin College.

The lectures commence about the middle of February, annually, and continue three months. The candidates for the degree of *Doctor of Medicine*, are examined by the Faculty of Medicine, at the termination of each course of lectures.

They must have devoted three years to professional studies under the direction of a regular practitioner of medicine, and must have attended two full courses of lectures, the last of which must have been at this institution. They must pass a satisfactory examination in *Anatomy, Physiology, Chemistry, Materia Medica, Pharmacy, Obstetrics, Surgery*, and the *Theory and Practice of Physics*, and must publicly read and defend a dissertation on some medical subject.

Those candidates who have not received a collegial education, must satisfy the Faculty of their proficiency in the Latin language, and in Natural philosophy. Degrees are conferred at the annual commencement.

The library consists of about 3000 volumes, principally of modern works, besides a valuable collection of *plates*.

The anatomical cabinet contains all the preparations which will be found necessary for demonstrations, and embraces many valuable specimens in morbid and comparative anatomy. The chemical and philosophical apparatus is ample, and furnishes means for full courses of lectures on these subjects.

3. *Law.* There are but two grades of the profession of the law, in the courts in Maine—*attorneys* and *counsellors*.

Hitherto, the regulations for their admission have been made by the court and members of the bar; and a certain period of literary pursuit or study in the profession had been required. But, by an act of the State, of the 28th March, 1837, it is provided, that in the month of July, annually, the Justices of the Supreme Judicial Court shall appoint three counsellors in each county, judicious men, and learned in the law, to be "*Examiners.*" This committee are to be sworn to the faithful and impartial performance of their duties, and to continue in office until others are appointed in their places, and have been notified thereof by the clerk of the court.

And every applicant, resident in the county, on producing a certificate from the committee, of his "suitable literary, scientific, and legal attainments" to the State District Court, and paying the requisite *duty*, shall be admitted to practice in that court; and, by an act of 8th March, 1838, all persons thus admitted to practice law, and of regular standing at the bar, are authorized to conduct, manage, and argue all cases, both of law and fact, in the Supreme Judicial Court. Each attorney is obliged, before his admission, to take and subscribe the oath to support the Constitution of the State and of the United States, and the following professional oath:—

"You solemnly swear that you will do no falsehood, nor consent to the doing of any, in court; and if you know of an intention to commit any, you will give knowledge thereof to the court, or some one of them, that it may be prevented; you will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice, but you will conduct yourself in the office of an attorney within the courts, according to the best of your knowledge and discretion, and with all good fidelity, as well to the courts as your clients: so help you God."

The act of 8th March, 1838, seems to have abolished all practical distinction between attorneys and counsellors. Before this, none but a counsellor could argue a question of fact or law; attorneys being confined to preparation of causes, reading papers, examining witnesses, and sometimes stating an *opening* to the jury.

By the rules of the Supreme Court of the United States, it is requisite to the admission of attorneys and counsellors, that they shall have been such three years in the Supreme Courts of their respective States. But counsellors are not to practice as attorneys, nor attorneys as counsellors.

The oath is :—

“I do solemnly swear that I will demean myself (as an attorney or counsellor of the court,) uprightly, and according to law, and that I will support the Constitution of the United States.”

By the rules of the Circuit Court of the United States, for the first circuit, any person, a graduate of any College or University, having studied law three years in the office of an attorney or counsellor of a Circuit Court, and been admitted for one year in a State Court within the circuits, may be admitted as an attorney. Those not graduates, must have studied *four* instead of *three* years.

Graduates studying *four* years, or others *five* years, may be admitted directly to the Circuit Court.

Those who have been admitted to any court, not the highest in a State, for three years, may be admitted in the Circuit Court. Attorneys, after two years, may be admitted as counsellors.

Attorneys and counsellors of the Supreme Court of the United States, of any Circuit Court, or of the District Court in the district, or of the highest State Court, may be admitted to like grade. In all these cases, proper testimonials as to character are required.

Any counsellor, of six years' standing, in practice, may be called to the degree of *Barrister*, and after ten years' practice, may be called to the degree of *Sergeant at Law*.

CHAPTER SEVENTH.*

PAUPERISM.

The poor are to be always with us—but they are of different characters and descriptions. 1. *Invalids*, or those who from bodily or mental infirmities are incapable of obtaining a sustenance. In these, we of course must include such children and aged persons as are incapacitated to pursue any profitable employment. 2. Those who have become destitute by casualty or misfortune. 3. *Idlers*, including those who are habitually indolent, or morally debased.

The first class are always proper subjects of public charity. But in a country where labor is in such demand, and so well paid, it is difficult to perceive how either of the other two classes can command much sympathy, or are entitled to a very liberal support. The *last*, which in other countries is by far the most numerous, including vagrants and sturdy beggars, are emphatically the greatest nuisances which infest society, and should *be made* to sustain themselves and families, in the best way they can be set at work.

Most of these have become destitute, and made their families so, by the excessive use of *ardent spirit*, and it has been a matter of serious inquiry, how far the venders of this poison should be made answerable for all the poverty which they inflict upon the community.

In this State, *the towns* are chargeable with their own poor, and may vote to raise money for the purpose, and for their employment, as other town charges. But it is matter of much

* Const. and Laws of Maine. Decisions S. J. C. Maine and Mass.

litigation to decide the residence or inhabitancy of those who are subjects of relief.

All persons are excepted from relief, by the towns, who have kindred within the degrees of children and grandchildren, parents and grandparents, of sufficient ability.

Paupers are, by the Constitution, excluded from the right of suffrage. The relief furnished to the pauper, however, must, in order to exclude him from voting, have been supplied *within three months*; and it would seem that it must be accepted by him, and if furnished to his family, it must be with *his consent*. A gratuitous relief could scarcely deprive a man of the right of suffrage.

SECTION I.—SETTLEMENT.

The law has defined, with considerable accuracy and precision, what shall constitute such a settlement, in any town, as shall entitle the person to relief.

1. A married woman follows and has the settlement of her husband, if he has any in the State; otherwise her own continues. But the marriage must be lawful.

2. Legitimate children follow and have the settlement of their father, if he has any; if not, their mother, if she has any, until they obtain a settlement of their own. Minor children follow the settlement which their mother acquired by a second marriage, if they gained none by their deceased father.

3. Illegitimate children follow and have the settlement of their mother at the time of their birth, if she has any; but neither legitimate nor illegitimate children gain a settlement by birth, if neither of their parents have a settlement in the place where born. But illegitimate children do not gain a new derivative settlement under their mother, but retain such as their mother had at the time of the birth.

4. Any person gains a settlement in a town by *admission* at

a regular town meeting, pursuant to a clause in the warrant for the purpose.

5. All persons having their homes in the territory incorporated into a town, become settled. Aliens are excepted.

6. Upon division of towns, all persons, whether residents there or having removed and not gained a settlement elsewhere, have their settlement where their residence happens to fall, upon the division; and when a new town is created by part or parts of one or more old ones, those dwelling and having their homes in the new, shall be considered as legally settled there.

7. A minor, serving his apprenticeship to any lawful trade for four years, and who shall, within one year, being twenty-one years of age, set up his trade, gains a settlement in the town.

8. Any person, twenty-one years of age, residing five years together in a town, without relief from any other town, thereby gains a settlement.

9. Any person dwelling and having his home in any town, on the 21st March, 1821, and not having received supplies within one year from any other town, as a pauper, becomes settled.

The last provision, it was expected, would prevent much litigation, and had very little regard to the justice of its distribution of burdens from paupers. But perhaps few expressions admit of more controversy in their application, than "*where he dwells and has his home.*" This provision extends as well to those who previously had settlement in the State, as to those who had not. A minor, emancipated from his parents, gains a settlement under it.

Aliens may acquire a settlement under this provision. So, legal presumption of the husband's death enables the wife to acquire a settlement by residence, under the same provision. But illegitimate children under age, living with their mother on the 21st March, 1821, do not follow the settlement which she acquires by residence, but retain that which she had at their birth.

SECTION II. — OVERSEERS.

Towns, at their annual meetings, may choose any number, not exceeding *twelve*, to be overseers of the poor; and if none are chosen, the selectmen are such, *ex officio*.

They are to take care of and oversee all poor and indigent persons settled in their respective towns, and see that they are suitably relieved, supported, and employed in work-houses or other tenements of the town, or as the town, in legal meeting, may direct, or otherwise, at the discretion of the overseers, and at the cost of the town.

They may bind out, as apprentices, to any trade, or as servants, any minor children whose parents are town paupers, or, in the opinion of the overseers, are unable to maintain them, to any citizen of the State—males until twenty-one, and females until eighteen years of age or marriage; providing, in the deed, for instruction of males in reading, writing, and arithmetic, and of females in reading and writing, and for such other instruction, benefit and allowance, within or at the end of the term, as may to them seem fit and reasonable.

They shall inquire into their usage, and defend them from injuries, and, upon complaint and hearing, the State District Court may discharge them from their masters; and the apprentices so discharged, or whose masters are deceased, may be bound by the overseers anew.

They may also have remedy on the indentures or deed, and the damages recovered, except what may be necessary for the wants of the apprentice, shall be deposited in the town treasury, for the benefit of the minor when he shall come of age; and the Court may, at its discretion, liberate and discharge the apprentice or servant; and the apprentice or servant may, moreover, have further remedy on the deed, when he shall become of age.

The Court may, also, on complaint of the master and notice to the overseers, for gross misbehavior of the apprentice or servant, discharge him from the service.

They may set to work, or bind out to service by deed, for a term not exceeding one year at a time, persons settled in the town or having no settlement in the State, married or unmarried, upwards of twenty-one years of age, "able in body, but having no visible means of support, who live idly and exercise no ordinary or daily lawful trade or business, for a living, and also all persons who are liable by law to be sent to the house of correction, upon such terms as they may think proper"—with a proviso for application to the State District Court, for relief from injustice in the case.

They have the same power in regard to the poor of unincorporated adjoining plantations, and may reserve their earnings, deducting the expenses, for the support of their families.

They shall prosecute for keeping houses of ill fame.

They shall provide for the immediate comfort and relief of all persons not belonging to, but found in, their towns, but having their lawful settlements in other towns, when they fall into distress and stand in need of immediate relief, and until they be removed to their lawful settlement; the expenses incurred within three months next before notice to the town to be charged, as also of their removal, and of their burial in case of decease, may be recovered by the town against the town of the pauper's settlement, provided the prosecution be commenced within two years.

The *settlement* of the pauper is not to be controverted if it shall have been adjudicated according to the provisions of the act, and a recovery shall be a bar of the question of settlement against the defendant town. Upon this provision of the statute, it has been determined that the action cannot be maintained if the expenses arose *more than two years* before its commencement, although *within three months* of the notice; but that a verbal express promise, by the overseers, will take the case out of the statute of limitations, and bind the town.

The overseers of a town in which there is a county gaol may,

by order in writing, set to work, under their own or the direction of some other suitable person, any debtor committed on mesne process or execution, and actually chargeable to any town in the State—the order to remain until revoked by them, or the prisoner shall provide for himself; but he is not compellable to work more than to support himself, and his earnings are to be appropriated to his support, so far as they are necessary.

Towns where there is a county gaol are obliged to provide for the relief of poor prisoners committed on execution, though their settlements are elsewhere, under the obligation to provide for paupers of other towns falling into distress, and standing in need of immediate relief.

The overseers may cause paupers, or those who, from age or infirmity, idleness or dissipation, are likely to become chargeable, to be removed to the towns of their lawful settlement. To this end, a prosecution, by complaint, may be instituted before a justice of the peace, or the State District Court—this Court to have concurrent jurisdiction with and appellate jurisdiction from the justice, and its decision to be *final*, without jury; but the facts must appear on the record, and the decision may be re-examined, by writ of error, in the Supreme Court. But the town to be charged, as well as the person likely to become chargeable, must be notified.

The overseers, however, may, previous to the process, send a written notification to one or more of the overseers of the town to be charged, stating the facts, and requesting payment of expenses incurred and the removal of the pauper; and if the removal is not effected or objected to within two months, the complainants may remove the pauper, and the overseers of the defendant town must receive him, and the town be liable for the expenses, and debarred of contesting the settlement. But it has been determined that this provision does not apply where it can be shown that the settlement is in the *notifying town*. It has been further adjudged and determined that an answer to the notice cures defects—that if it be signed by a major part of the overseers, or an authorized agent of the town, or the chairman of the selectmen, it is sufficient.

The overseers shall also relieve and support, (and in case of decease, decently bury) all necessitous persons having no legal settlement in the State.

They may employ them as other paupers. The expense incurred to be paid by their kindred, if able, otherwise by the town. Such strangers may be sent out of the State, into any other State, or beyond sea, to the place where they belong—taking care, it is presumed, not to infringe the laws of the place to which they may be sent.

Towns are liable for the relief of a pauper by any inhabitant not obliged by law to support such pauper, after notice or request made to the overseers, and until provision is made by them.

The overseers may, by complaint, and after notice and hearing before a justice of the peace, cause any person needing assistance and support, who is notoriously subject to habits of intemperance, to be committed to the house of correction, to be supported at the expense of the town, and when not an inhabitant of the town, at the expense of the county, until discharged by the joint order of the overseers of the town in which the house of correction may be, and two justices of the peace *quorum unus*.

Towns incurring expense for the support of a pauper, may recover it of him or his legal representatives.

In all prosecutions on the pauper laws, overseers, or a major part of them, or any person authorized by them in writing, may appear in behalf of their towns.

Plantations are empowered to raise money for the support of their poor, to be applied by their assessors.

SECTION III. — WORK-HOUSES.

The towns have power to erect work-houses, for the reception, support, and employment of the idle and indigent; and may, at their annual meetings, choose three, five, seven, or more overseers, with power to appoint a master and needful

assistants, who are to have the more immediate care and oversight of the persons. The overseers shall hold monthly meetings to determine on their duties, and make rules and regulations for the house, which are to be binding until the next public town meeting, when they shall be presented, and if approved, shall be continued until revoked by the town.

Towns may also combine for this purpose, and may purchase land, erect a house, make rules, appoint and remove officers, and each town may choose three overseers, or all may agree upon a different number, which shall constitute a board. Vacancies may be filled by each town, or if either neglects, the others may act without them.

They must hold quarterly meetings, besides special ones, and the employment and compensation of officers, the obligations of the towns to do their proportion, and other duties, are specially prescribed.

When a town shall have erected *a house of correction*, or shall appropriate a work-house to the purpose, the selectmen shall appoint three, five, or seven overseers, and a master, except in the house *appropriated*, which shall be governed by its own master.

The operation of this system of the poor laws has been to *discourage* pauperism. Few towns have resorted to poor houses, or houses of correction, as the number of paupers has been too small to make it an object, and they have been supported in different families, or put under the care of some suitable person, and kept together; and in many instances, partial support is furnished to families or individual members, at their own homes.

The provision in the Constitution that grants to every male whose residence has been established in the town three months, and is arrived at the age of twenty-one years, the right of suffrage, except *paupers, persons under guardianship, and Indians*, deters many from asking support.

The facility of obtaining employment, and the ample reward to labor, reduce the paupers almost exclusively to the two classes of *invalids* and *idlers*, or vagabonds. It therefore re-

quires a case of great distress, before a man of correct habits will disfranchise himself and endure the mortification of being ranked with either of these descriptions, especially the latter.

We have no accurate data by which we can determine the number of persons who are supported, in whole or in part, by public charity. It should be recollected that, in comparing our paupers with those of other countries, we have few charitable institutions, which subtract from the number which the public maintain. It is probable, however, that not more than *two per cent.* of the whole population would come within the description, and the whole annual expense of support would not exceed \$200,000. It is ascertained that the whole sum levied annually for the poor rates for England and Wales, taking an average of several years, amounts to about \$32,000,000 of our money, and that the number supported, in whole or in part, is about one sixteenth of the whole population.

CHAPTER EIGHTH.*

SPECIAL RELATIONS.

There are certain reciprocal relations in every regulated society, which unite more intimately our conditions in life. These are the relations of *husband and wife*, *parent and child*, *master and servant*, *guardian and ward*, and *corporations*.

* Stat. Maine. Kent's Com. Chitty's Bl. Const. and Laws U. S. Decisions S. C. U. S.

SECTION I.—HUSBAND AND WIFE.

I. *Marriage*. Marriage is, by our laws, a *civil contract*, but differs from most others in this: that it is not dissoluble by the contracting parties. It is to continue during the life of the parties, unless dissolved by *judicial* authority, for causes defined by law. “By judicial authority,” for it is very doubtful whether the Legislature has the power, *as a Legislature*, to grant a divorce from the bonds of matrimony. As they have never attempted to exercise the power but upon the request of both parties, it may not come within the prohibition to pass laws “impairing the obligation of contracts,” still, as the Constitution has distributed the powers of government into *legislative, executive, and judicial*, and provided that “no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others,” except only in the cases expressly permitted, and as no express permission would seem to reach the case, it is not readily perceived how the Legislature can exercise such a power.

Marriage is prohibited within the following degrees of affinity and consanguinity—*viz*: A man may not marry his *mother, grandmother, daughter, son's daughter, daughter's daughter, step-mother, grandfather's wife, son's wife, son's son's wife, daughter's son's wife, wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, sister, brother's daughter, sister's daughter, father's sister, mother's sister*—and a woman is prohibited to marry the corresponding male relations—and all marriages within these degrees, are incestuous and void.

Marriages are also void if the party have a former wife or husband alive.

Also, those between a white person and a negro, Indian, or mulatto.

Males under *twenty-one* and females under *eighteen* years of age, are not permitted to marry without consent of parent, guardian, or other person having the care of them.

Marriage before the age of consent, however, is voidable by the *minor*, but binding on the other party, until the minor avoids.

Idiots, and lunatics, (except in lucid intervals,) are incapable of marrying.

The marriage, if legal by *the law of the place* where solemnized, is valid in this State.

No particular ceremonies are necessary to the valid celebration of a marriage, if it be sanctioned by some person authorized by law.

Justices of the Peace, and such ordained ministers of the Gospel as may be commissioned for the purpose by the Governor and Council, are authorized to solemnize marriages within their several counties. Publishments of intention are necessary to authorize the solemnization, and all who marry contrary to the provisions of the act, incur penalties.

If the officer join in marriage without publication of banns, the marriage is valid, although he incurs the penalty.

II. *Divorce*. Divorces from the bonds of matrimony may be decreed for the following causes, *viz.*—

1. If the former wife or husband be alive.
2. For consanguinity.
3. For impotency in either party.
4. For adultery of either of the parties; and it is adultery if either of the parties be married.
5. Wilful desertion of either party, without reasonable cause, or joining the society of *Shakers*, (whose creed forbids marriage or sexual intercourse,) or confinement in the State Prison *for five years*—with provisos against collusion.
6. A confirmed and common drunkard for three years, whereby the party is rendered incapable of taking proper care of his or her family.
7. Where the consent of either party to the marriage was obtained by fraud—except there be cohabitation after the discovery of the fraud.

If the adultery be by collusion of the parties, or both parties have been guilty, no divorce will be decreed.

In cases of divorce for affinity or consanguinity, or impotency of either party, the wife shall have the restoration of all her real estate, and all or any part of the personal estate specifically, or the value.

Where the divorce is for adultery of the husband, the wife is to have her dower, and the real estate which he held in her right, and all or any part of the personal estate which she brought him, or the value of it; and if these provisions are insufficient, the court may assign her alimony out of her husband's estate.

If the divorce is for adultery of the wife, she forfeits to the husband all her personal estate, and all real estate during *his* life, in case of issue, if otherwise, during *her* life.

III. *Foreign divorces.* A foreign judgment of divorce, obtained by *fraud*, or *without notice*, is void.

By the Constitution of the United States, "full faith and credit is to be given in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, *and the effect thereof.*" Congress has prescribed the manner of proof, and *the effect*—and the *effect* of a judgment is to be *the same in every State as in that where it was rendered*. If the Court of another State granted a divorce, having jurisdiction of the case, and giving notice, it would be valid in this or any other of the United States.

IV. *Divorce from bed and board.* These divorces may be granted—

1st, For extreme cruelty of either of the parties.

2d, When a husband shall utterly desert his wife.

3d, When he shall grossly or wantonly and cruelly neglect or refuse to provide suitable maintenance for her, according to his ability.

This species of divorce may be *forever*, or for a *limited time*.

The decree may be revoked by the court, upon application of the parties, and evidence of reconciliation.

In case of this divorce, on application of the wife, no issue being alive, she shall be restored to all her real estate, and have such allowance out of his personal estate, as alimony, as the court may deem reasonable—having regard to what she brought her husband, and his ability. But, if there be issue living, the court exercise their discretion, as to real and personal estate, according to the circumstances of the case. The court may also order, if the case justifies it, all or any part of the husband's real estate, or the rents and profits, to be set off to the wife during her life.

Pending the libel for divorce by the wife, all the husband's real estate, in the State, is attached, and held to answer the result.

If the divorce be prayed for by the husband, for the cruelty of the wife, the court has full discretion, as to the restoration of her lands and granting alimony.

Children begotten and born during the separation are illegitimate, unless access be proved.

In case of divorce from *bed and board*, the wife may sue and be sued, as sole, for contracts, &c., subsequent to the divorce.

V. *Marriage and its legal consequences.* The legal existence of the wife is suspended during the union.

At law, no contract can be made between the parties, but by the intervention of trustees.

Neither party can convey lands to the other. Yet the wife may release her dower, in a sale by her husband, by inserting her relinquishment in the deed, and executing and acknowledging it, or by separate release, duly executed.

The husband may devise lands, &c., to her, for the devise only takes place at her death. The wife, too, may make a will, with the consent of her husband, and in case of agreement before marriage that the wife might make a will, and she, during the coverture, devises to her husband, this devise in equity will be sustained.

Wife tenant in *fee*, the husband becomes, by the marriage, tenant of the *freehold* during their joint lives—and if she die without having had issue by him, the estate goes to her heirs; but, in case of issue *born alive*, whether living at her death or not, the husband takes the estate for life, as *tenant by the courtesy*. An estate given to, or purchased by, husband and wife, jointly, during the coverture, they are neither joint tenants nor tenants in common, but are both seized of the *entirety*; neither can sell without the consent of the other, and the survivor takes the whole.

The husband also becomes seized of the *chattels real* of his wife, during her life. He has a right to, and may sue for and recover, her *choses in action*. Her personal property in her own right, but not *in right of another*, is immediately vested in her husband.

He is answerable for her debts before coverture, but if not recovered during coverture, he is discharged.

He is bound for necessaries for her.

The wife is, in equity, entitled to hold property, by the intervention of trustees, as if she were sole.

She may have a suit against her husband, and may dispose of the trust estate, even without the intervention of the trustees.

The husband may assign his wife's *choses in action*, for a valuable consideration, and thereby bar her right of survivorship—subject, nevertheless, to her right in equity.

If the husband bring the action in *his own name*, the debt, when recovered, does not survive to the wife; otherwise if in their joint names.

The husband is liable for the torts and frauds of his wife, and if committed in his company, or by his order, he is answerable alone.

The husband and wife cannot be witnesses for or against each other, either in criminal or civil suits, except, in cases of personal injury or danger, she may, on her complaint on oath, bind him to the peace.

And where the wife acts as agent of her husband, her declarations have been admitted to charge him.

SECTION II.—PARENT AND CHILD.

The father is obliged to support and maintain his minor children, even if they have property of their own; but in such case the mother is not.

The obligation to relieve destitute relatives extends, in Maine, to children and grand-children, parents and grand-parents, if of sufficient ability; and the courts will adjudge what proportion each shall furnish towards the relief.

The parent, where the child is driven from his protection, is obligated for *necessaries*. But it must be a case of *clear necessity*, to charge the parent where the child is under his immediate care.

Emancipation of a child is not to be presumed, but must always be proved.

A father may have an action for the seduction of his minor daughter, though she resides out of his family, unless he has divested himself of the right to control her person or require her services.

In case of separation of husband and wife, the court will, upon *habeas corpus*, order the children into the custody of the father or mother, as the case may require, having regard to the articles of separation, and all the other circumstances.

Fathers and mothers of bastard children are chargeable for their support. In a complaint for bastardy by the mother against the putative father, she is a witness, and her credibility is to be left to the jury. But it is a pre-requisite that she should charge the same person in the time of her travail, and should have continued constant in her accusation.

The period of majority of both sexes is twenty-one years, and that age is completed the day *preceding* the anniversary of the birth.

The acts of infants, capable of being ratified, are *voidable* only, and are binding on the other party, being of age.

Infancy does not protect against fraudulent acts, and the infant is liable in *assumpsit* for money embezzled.

An infant cannot make a will, either of real or personal estate, nor be executor—and when appointed as such, administration with the will annexed, shall be granted during his minority; nor can he be appointed administrator, though next of kin.

SECTION III. — MASTER AND SERVANT.

No one is a servant absolutely nor perpetually, except for crimes.

An apprentice is one bound to service for a term of years, to learn some art or trade.

Males under twenty-one, and females under eighteen and unmarried, may be bound, by their own consent and that of their parents; and males and females under fourteen may be bound until that age, by parents or guardians, without their consent; and minors of fourteen or over, having no parents or guardians, may bind themselves, with the approbation of the selectmen of the town.

A hired servant is bound to perform the services and the master to pay the consideration; but if a servant, hired for a definite time, leaves the service without sufficient cause, he forfeits his wages.

The master is bound for the contracts and injuries of his servant, when acting under his authority.

And if a minor wilfully set fire to woods or woodlands, not being the owner, the parent or master is answerable in a *quitam* prosecution, and in a special action for the damages.

SECTION IV.—GUARDIAN AND WARD.

A *guardian* is one who has the custody of the persons and estates of those who are not of sufficient discretion to guide themselves and their own affairs. The *ward* is one whose person and estate are thus taken charge of.

As guardians by *nurtu. e* and in *socage* are scarcely known, except in the English books, those only will be noticed which may exercise their powers by the laws of this State.

I. *Guardians by nature.* These are the *father*, and, in case of his decease, the *mother*.

If a child becomes vested with personal property in the life time of the father, he cannot take it as guardian *by nature*, nor can any one, until a guardian is appointed.

II. *Guardians by judicial appointment.* The Judges of Probate in each county may *allow* guardians chosen by minors above the age of fourteen, and *appoint* them for those under that age. And the judge may appoint guardians to minors above fourteen, in case the minor should be cited by the Court of Probate for the purpose, and refuse to appear, or the guardian chosen by the minor should be unable to give bond, or when the minor is out of the State. But no executor or administrator shall be guardian to a minor interested in the estate.

All guardians appointed by the Judge of Probate are to be under bonds for the faithful discharge of their trusts.

They are to return an inventory of all the ward's estate within three months.

They are to render an account of their guardianship once in three years, and oftener if required by the Judge of Probate, and if they fail, unless from sickness or unavoidable accident, it is a breach of the bond, sufficient cause of removal, and a forfeiture of all claims for personal services.

The judge may at his discretion order new bonds, and unless

they are furnished within the time limited, the guardian may be removed, and another appointed.

The guardian may have his action for damages against any one who shall entice or carry away his ward.

In case of partition of real estate, the court will take care that if minors are interested, and have no guardians, such shall be appointed before the partition shall be executed.

Guardians may, if the Judge of Probate shall judge it for the benefit of the minor, purchase the right of dower in the estate, and pay for it from the personal estate.

The guardianship by *feme sole* terminates by her marriage.

Guardians are also to be appointed, by the Judges of Probate, at the request of kindred, or selectmen, to *idiots*, *non compos persons*, and *lunatics*. These guardians are to have the care of their persons and estates, and to give bonds, with sureties, to return an inventory, as in cases of minors, and to settle accounts.

The guardians are to manage the estates frugally and without waste, and apply the income to the comfortable support of their wards and their families; they shall settle accounts, sue for and recover debts, and improve, manage and divide the real estate, in the same manner as their wards themselves could do it, and shall pay their debts from the personal estate, and if this be insufficient, from their real estate, first having license by the court to sell, the same as executors or administrators. And where a partial sale, sufficient to pay debts, would be injurious to the interest of the ward in the residue, the Judge of Probate may order the sale of *more*, or the *whole*.

The Judge may, moreover, order the whole of the real estate of a *non compos*, or *minor*, to be sold, and the avails put at interest, when it shall appear to be for his benefit.

Guardians may, by the same authority, be appointed, also, to the children of such idiots, lunatics, and non compos persons, as though they were dead.

Whenever a person, by excessive *drinking*, *gaming*, *idleness* or *debauchery*, shall so spend, waste, or lessen his estate, as to expose himself or family to want, or shall, in the judg-

ment of the selectmen, expose the town to charge or expense, guardians may be appointed, who shall have the same powers and be subject to the same duties and liabilities, as those of idiots, &c.

The courts, in the appointment and dismissal of guardians, and in the settlement of their accounts, &c., proceed by notice to the parties interested.

Stocks in corporations or public funds, belonging to the wards, cannot be transferred without a previous license from the Judge of Probate.

III. *Guardians by deed or testament.* These are of the *person and estate*, supersede other guardianships, and extend to twenty-one years of age. But this guardianship of a female terminates by her marriage, as far as regards her *person*, but as to her estate it is not certain.

SECTION V. — CORPORATIONS.

A corporation is a body politic, or artificial person, of capacity to grant and receive, to sue and be sued—maintaining a perpetual succession, and enjoying a sort of immortality. It is either *sole*, when the corporate rights are vested in a single individual, or *aggregate*, when they are vested in a number.

They have been divided, whether sole or aggregate, into *religious* and *lay*; the *former* consisting solely of spiritual persons, and created with a view of promoting religion and perpetuating the rights of the church; the *latter* are *civil* or *elemosynary*—the civil are created for different temporal purposes, as for the good of government or advancement of trade, or employment, or enterprise. Of the *former* are parishes—religious societies; and *deacons* of protestant churches not episcopal, and *wardens* of episcopal churches, if donations are made to their respective churches, the poor of their churches, or to them and their successors, and if they are associated with

the ministers in the one case, and the elders or vestry in the other, these constitute the corporation. These are instances of *religious* corporations *aggregate*. Ministers of protestant churches are authorized to take, in succession, lands granted to the minister, in succession, or the use of the ministers—and these are instances of *sole* corporations for religious purposes. There is a sort of visitatorial power over these corporations. Ministers of towns (parishes,) districts, or precincts, cannot alienate without their consent, nor those of episcopal churches without the consent of the vestry; and all other churches may call their *deacons* so constituted corporations, to account for any misapplication of the funds.

Lay corporations, *eleemosynary*, are for the purpose of distributing the bounty of the founders. In these corporations the visiting power is in the founder, unless a visitor is appointed in the grant or donation.

Corporations must be created by an act of *the State* or of *Congress*; except that, in certain cases, persons, under existing laws, may *incorporate themselves*, by adopting and pursuing certain measures. The State law authorizing the incorporation of religious societies is an instance.

In civil corporations, the visiting power is in the government.

Public corporations may be changed or dissolved by the Legislature; otherwise of private corporations—these being *contracts*, which *State laws* cannot impair, without infringing the Constitution of the United States. All banking institutions are of the latter class, still a grant *during* the pleasure of the Legislature would give the right to abrogate the charter at discretion.

The incidents to aggregate corporations are—the right of succession, and to this end to fill vacancies—to sue and be sued—have a common seal, and a corporate name—to take and hold estate—to make by-laws, and remove members. Some of these incidents are regulated, modified, or restricted in the grant.

Counties are corporations for certain purposes. They may sue and be sued, prosecute and defend to final judgment and

execution ; and to satisfy an execution every inhabitant is liable, and he may have his remedy over against the county for a remuneration.

An action by an individual against a county, whether local or transitory, may be commenced and prosecuted in the plaintiff's or defendant's county ; and where the county is plaintiff against an individual, may be prosecuted in the defendant's county, unless he live in *the same*, in which case it must be in an adjoining county ; and where the suit is against a county by an inhabitant, it may be prosecuted in the same or an adjoining county, at the plaintiff's election. Where the county and a corporation are parties, the suit may be prosecuted in an adjoining county ; as also where the controversy is between two counties.

Our Government seems to be based upon corporations. *Towns* are not only *civil* and *religious*, but *political* corporations. Their powers, and those of their selectmen, in elections, have been already noticed ; as also those in regard to education, roads, paupers, &c. Each town is also *a parish*, and when parishes or other religious societies are taken or carved out of a town, the residue of the inhabitants, with their estates, constitute the *first parish*, and succeed to all the parochial funds and estate.

They may sue and be sued, and execution may be satisfied against any individual, and he has the same remedy over as in the case of counties, and they are liable to information and indictment for neglect of corporate duties.

By an act of 16th Feb., 1836, "concerning corporations," they are authorized, in their corporate name, to sue and be sued—appear, prosecute, and defend to final judgment and execution—to have a common seal, and to alter it at pleasure—to elect their officers, fix their compensation, and define their duties, obligations, and liabilities, if consistent with the Constitution and laws of the State. The mode for calling the first meeting is prescribed ; the shares of the stockholders are made liable for the corporate debts, and in case of deficiency, the individual property of the stockholder, to the amount of his

stock, is held liable for all debts prior to the transfer, for one year after the record of the transfer in the books, and for six months after judgment, on any suit commenced within the year after the transfer; and such individual may have a contribution for what he shall have paid, against the other stockholders, in proportion to their stock.

But if the individual discloses to the officer having the execution, attachable corporate property, the officer shall be obliged to take it, and the clerk of the corporation is obliged to furnish him with the names and residence of the stockholders.

The principal *private* corporations in the State are *Roads and Canals, Manufactories, and Banks.*

Turnpikes and rail-road corporations come under the general provisions of the "act concerning corporations," unless it be otherwise provided.

Each may hold lands necessary for their respective roads and appurtenances. Each are liable for damages to individuals over which their respective roads shall pass, to be assessed by a court or jury; and the lands in each case revert to the original owner, on the discontinuance of the road.

Rail-roads may pass over or under turnpikes or other roads, and these may be raised or lowered for the purpose, provided they are made as good as before.

There are many special provisions in regard to these corporations, which cannot, consistent with our limits, be included here.

Manufacturing Corporations. These have at different times become and ceased to be the favorites of the State. They have been exempted from taxation for six years from their establishment, and the exemption has been repealed. The stockholders are now liable for corporate debts to the amount of their stock, out of their private property.

Banks and Banking. A banking corporation is an association of men chartered by the Legislature, for the purpose of letting money at a rate of interest established by law, receiving it on deposit, disbursing it, and facilitating exchanges. Banks are properly commercial institutions, which by affording

credits or issuing notes as the representative of money enable merchants and dealers, with greater facility, to buy and sell commodities. The produce of one country is thus exchanged with that of another, by means of a medium to which an ideal value is attached. Hence the great utility of banking establishments in all commercial countries.

The banks of Maine are under strict and rigorous regulations. After receiving the charter, one half of the capital stock shall be paid in, in gold and silver, in *six months*, (and until this is done, the bank is not to go into operation,) and the other half is to be paid in *twelve months*.

Banks having capitals of \$50,000, may have bills in circulation to the amount of their capitals; those above that, and of \$150,000, equal to three fourths; and those above this, equal to two thirds.

Banks are not to loan on pledge of their own stock, nor discount notes, bills of exchange, drafts, or other security for payment of money, without two responsible names—a *firm* to be considered as one person; and no loan is to be made to a stockholder until his shares have been fully paid in. The total amount of debts due from the bank is not to exceed twice its capital paid in, exclusive of sums due on deposits, and the directors, except those absent or dissenting, are *severally* liable for the excess; not, however, exempting the corporation. Nor shall there be due, at any time, to the bank, more than double its capital.

Banks are not to be engaged in trade or commerce, except they may sell and dispose of pledges to remunerate the loan, interest, and expenses.

Banks neglecting to pay their bills in gold and silver on demand, shall, after the expiration of *thirty days*, if the bills are redeemable at their own counter, pay twenty-four per cent. until payment or tender; and if redeemable elsewhere, the penalty attaches in *fifteen days*.

All these banks are obliged to loan to the State on notice and demand, to the amount of five per cent. of their capital, and at an interest not exceeding five per cent., reimbursable in

five annual instalments, at furthest; provided, that the State shall never be indebted to any bank above ten per cent. of its capital.

The State may become a stockholder to the amount of *ten per cent.* of the capital, and in such case, may appoint one director.

Each bank pays an annual tax of one per cent. on its capital, for the use of primary schools.

The shares may be taken and sold on execution.

The real estate and mortgages of banks may be taken for their debts.

Banks are to be under the management of from *five to nine* directors, taken from the stockholders, and one of whom shall be President; and a majority of the board is necessary to a decision.

The Cashier is to give bond with sureties, which bond shall be renewed *annually* in October.

If banks neglect or refuse, for fifteen days, to pay their bills or money deposited, and on being summoned by a justice of the Supreme Court, shall neglect to appear, he may appoint three commissioners, who, on giving bond, shall assume all the concerns and property of the bank, and pay and receive all dues from and to the bank.

The ordinary powers of these institutions are similar to those of other corporations, and the stockholders are liable from their private property, to the amount of their stock.

The first Bank of the United States was established under an ordinance of the old Congress, in 1781, and commenced operations in the city of Philadelphia. Doubts were very justly entertained of the powers, under the Confederation, to establish such an institution; and the Legislature of Pennsylvania passed an act of confirmation, which, however, was afterwards repealed, and then re-enacted for the term of fourteen years.

The Constitution of the United States was adopted, and in 1789 went into operation, and in 1791 the Bank of the United States was granted, with a capital of \$10,000,000, divided

into 25,000 shares of \$400 each. It was limited to twenty years, and after an ineffectual struggle to renew it, was suffered to expire in 1811.

From that time until 1816, there was no other bank paper in circulation but that of the State banks, and during the whole time, including the period of the war with Great Britain, the exchanges were much deranged, and the Treasury of the United States suffered much loss and embarrassment by its negotiations with these local banks.

But on the 10th April, 1816, the late Bank of the United States was incorporated, with a capital of \$35,000,000, in 350,000 shares of \$100 each—70,000 shares to be subscribed by the United States. \$7,000,000 was to be paid in, in specie, and \$21,000,000 in specie or the funded debt of the United States—7 per cents at \$106 50 per \$100, 6 per cents at par, and 3 per cents at \$66 50 per \$100—and the Secretary of the Treasury was authorized to subscribe the \$7,000,000 in behalf of the United States, in specie, or stock bearing an interest of 5 per cent.

The grant was for *twenty years*, with powers similar, in most respects, to other banking incorporations.

The corporation was under the management of twenty-five directors, being stockholders, five of whom were to be appointed by the President, with the advice of the Senate; the board to elect their President and Cashier, and other officers.

They were not, without further authority, to owe more than \$35,000,000 exclusive of deposits. They were not to engage in trade, except in bills of exchange, or gold or silver bullion, or in goods *pledged*, or lands taken for debts.

They were not to loan to the United States more than \$500,000, nor to a State more than \$50,000. They were authorized to establish branches any where in the United States or Territories. No stockholder except a citizen was allowed to vote for directors, and no note to be issued of less amount than five dollars. The grant was *exclusive* for the period, and provisions were made to protect it from frauds or forgeries, and to punish the corporation and officers for violations of the terms of the charter.

The charter of this bank has expired, and several attempts have been made, but without success, to provide a substitute which shall aid the fiscal operations of the Government, and at the same time give to the people a safe and uniform medium of exchange.

Banking, and indeed all other private corporations, have been denounced, and by high authority, as granting exclusive privileges and monopolies, and destroying competition. Adam Smith, who wrote with a view to his own country, and whose principles *there* are much preached and very little practised, has taken the ground that corporations, for purposes of industry, destroy competition. In a country where labor is cheap, and capital *accumulated*, with their long apprenticeships, poor laws, and other trammels upon the free circulation of labor, and their rules of primogeniture and aristocracy, there may be danger that large overgrown incorporations will diminish the competition of productive industry. But *here*, labor is free, and capital *diffused*. Were we to leave our infant manufactures to individual enterprise, they would either languish and fail, or be engrossed by the few rich capitalists, who, if they could be sustained against foreign competition, might become *producers upon their own terms*. By these incorporations, associations are formed by men of moderate capitals, which are adequate to important enterprises, but, without combination, must have languished or failed.

Exclusive privileges, which subtract from others all that is granted, are certainly to be condemned. But we are too much inclined to believe that this is the case. A manufactory which gives to the consumer articles cheap, and continues to do so, adds to, instead of subtracting from, the interests of others. A turnpike or rail-road company, however profitable the concern, takes nothing from the traveller, but gives him, perhaps, more than an equivalent. If a corporate company pays a *bonus*, and performs other duties to the government, or if it pays a tax upon its capital stock, and instead of otherwise injuring the community actually benefits it, the odium of "exclusive privilege" can never attach. Besides, the multiplication

of these incorporations, instead of diminishing, actually increases the competition, and adds, not only to the amount of production for consumption, but to that for reproduction, and we may safely ascribe much of the successful enterprize of New England to incorporations for purposes of industry.

BOOK THIRD.

PERSONAL PROPERTY.

OCCUPANCY is the origin of exclusive property. Labor in the acquisition justifies the occupancy. The products of the soil are the property of the *producer*, and the land becomes his as the instrument of production. The occupation, temporary at first, becomes at length a permanent title, by repeated crops from the same cultivator, and the improvements which are super-added to facilitate production. The *justice* of permitting every one to have what he had thus acquired, might have induced an acquiescence, and at length produced a combination for mutual enjoyment; and it is a fair inference, that *the occupancy of one, with the acquiescence of the rest, is the origin of PROPERTY*, as well *personal* as *real*.

Things personal are comprehended under the general name of *chattels*. They are every kind of property which is not *real estate* or *freehold*. They are *real* or *personal*.

Chattels real are *immoveable*, as interests in lands and tenements, that are bounded by a definite time of duration—such as estates for years, estates at will, and estates upon condition.

Chattels personal are things *moveable*, which may be transferred from place to place.

CHAPTER FIRST.*

THE RIGHT TO PERSONAL PROPERTY.

Protection of property is the surest stimulus to industry. In a country where property is equally within the reach of all who will honestly strive for it, a war of the poor against the rich would be of all things the most disastrous, especially to the poor themselves. If any one thing, more than another, distinguishes pre-eminently a free government from a despotism, it is a guaranty for the enjoyment of property. Among the "natural, inherent, and unalienable rights" secured to the people of Maine by their Constitution, are those of "acquiring, possessing, and protecting property." Once encourage the notion that a man is to become odious for honest acquisitions of wealth, and that the idle or vagrant ought to come in for a distribution, and all inducement to industry is destroyed; for no one will labor and toil for property, when the laws will not protect him in the enjoyment of it. Whatever may have been the origin of the right of property, it is certain that it cannot be *now* enjoyed but by the aid of protecting laws.

SECTION I.—PROPERTY SUBJECT TO TAXATION.

Every one holds his property subject to taxation for the use of the State and the United States, as a consideration for its protection by the laws of the land.

* Laws Mass. Const. and Laws Maine. Const. and Laws U. S. Decisions S. C. U. S. and S. J. C. Mass. & Maine.

Taxes are, and have been for a long time, assessed on the *polls* and *estates* of the people of Massachusetts; and the same principle has been adopted in Maine. A *poll tax* is one assessed upon the person of the individual, and is limited to males of twenty-one* years of age and upwards, and it does not ordinarily exceed one sixth of the tax required.

The Constitution provides that, while the public expenses shall be assessed on the *polls* and *estates*, a general valuation shall be taken at least once in ten years, and that "no tax or duty shall be imposed without the consent of the people, or their representatives in the Legislature."

Taxes, as soon as *assessed*, if not as soon as *granted*, may become a *lien* upon the property, which will be held pledged for its payment, and may be sold, to the amount of the assessment and costs, notwithstanding any intermediate or subsequent conveyances.

By the Constitution of the United States, Congress has power to lay and collect taxes, duties, imposts, and excises. *Direct* taxes are to be in the ratio of representation, and all duties, imposts and excises are to be uniform throughout the United States.

Direct taxes embrace only *land* and *capitation* taxes, and they must be apportioned among the States according to representation. *Indirect taxes* do not admit of this apportionment, but they must be uniform on the subject taxed. It would seem that the power of taxation given to Congress is general and plenary—including every possible subject, with the exception of a tax on *exports*, and except, perhaps, *franchises* granted by the States, where the tax is demanded as an *equivalent* for the grant.

SECTION II.—SUBJECT TO PUBLIC USES.

The Constitution of this State has guarded the right to property, by a provision that "private property shall not be taken

* See an error, of *sixteen* instead of *twenty-one*, in page 51.

for public uses, without just compensation, nor unless the public exigencies require it."

The Legislature are the judges when the exigency occurs, and they have, in cases of turnpike, railroad, and canal corporations, appropriated *private* property, and prescribed the mode of determining the equivalent. As these are *private corporations*, the Legislature must have decided upon the ground that these grants were of such *public* benefit as to authorize the appropriation. But if they may grant to a company a right of taking the property of a citizen without his consent, on the hypothesis that the enterprise is a public benefit, why may they not accord the same privilege to a single individual? This high prerogative, however, of taking private property, will, no doubt, be exercised with much caution, and to whomsoever the grant is made, the *object* of the Legislature must be, emphatically, *the public good*. The same protection to private property will be found in the Constitution of the United States.

SECTION III.—PROTECTED FROM RETROSPECTIVE LAWS.

Property can never be secure if it may be subjected to retroactive legislation. No law ought ever to be made to interfere with or affect private contracts or engagements, previously formed.

The Constitutions of the State and United States have therefore prohibited the States from passing any law "impairing the obligation of contracts."

Much talent and ingenuity have been exhausted to expound and apply this very plain prohibition. The obligation of a contract is the duty to fulfil it, and that duty is to be understood according to the law existing at the time it was made. Whether the law constitutes the obligation or the rule of its interpretation, or the power to enforce it, it would seem to admit of no doubt that it is to be executed according to the *legal* understanding of the parties at the time it was made.

The term *contract* is understood to extend to those *executed*, as well as to those which are *executory*. Hence, a *grant* to a corporation, and a *deed of lands*, come within the prohibition, and are protected from any State legislation which enlarges, abridges, or in any manner changes the intention of the parties.

A law of a State, making a grant to any one, is embraced, also, within the prohibition, and no subsequent Legislature could abrogate it, or vary its terms.

Contracts between States have the same protection, and no subsequent legislation, by either party, without the consent of the other, can impair their obligation.

But this prohibition can never extend to State laws which are prospective in their operations; in every well regulated community, there should exist a power to control parties in making their contracts, in providing how they shall be executed, and even in prohibiting the execution of such as are against public policy. Hence, State insolvent laws, operating upon future contracts, do not come within the prohibition.

CHAPTER SECOND.*

PROPERTY QUALIFIED OR UNCERTAIN.

SECTION I.—LIGHT, AIR, AND WATER.

The elements of light, air, and water are common to all, yet an exclusive right in them may be acquired. He who places himself in the advantageous enjoyment of a just proportion of them, cannot be lawfully deprived of that enjoyment,

* Chitty's Bl. Angel on Water-courses. Stat. Maine. Kent's Com. Decisions S. C. U. S. and S. J. C. Maine.

and whoever attempts to impair the right creates a nuisance for which he is responsible. If I have an ancient window overlooking my neighbor's ground, he has no right to obstruct the light. An adverse enjoyment for twenty years, unexplained, is presumption of a grant. If my neighbor erects a tan-yard so as to render the air of my house and gardens less salubrious, the law gives me a remedy against him; but if *he had the first occupancy*, the nuisance is of my own seeking.

By statute provision of this State, the selectmen of the town, with two justices of the peace, of the county, may assign places for carrying on noxious trades, and after such assignment, any person pursuing the trade elsewhere is, on conviction, liable to a penalty and a prohibition to carry on the trade there for three years, and, in default of compliance with the judgment, imprisonment, and prostration of the nuisance.

And when the house, &c., so assigned shall *afterwards become* offensive, the occupier may be punished by fine and a removal of the nuisance.

If, after notice by any person aggrieved, the proprietor or occupant shall not remove the nuisance, he shall forfeit to the prosecutor twenty dollars per month, so long as he shall continue it. And the party injured is, moreover, entitled to his action for damages.

If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill or meadow—for he has, by the first occupancy, acquired a property in the current.

Running water belonged originally to the public, and an individual can only acquire a right to it by applying so much as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right by subsequent appropriation, cannot be disturbed in the enjoyment.

If one erects a dam *above* a mill, so as it only affects the *regularity* of the supply, the plaintiff is entitled to damages. But, if a site once occupied, be abandoned by the owner, evidently with an intent to leave it unoccupied, the owners above and below will have the same right to erect and maintain mills as if none had been previously erected.

One tenant in common cannot divert the water from the common mill for his own separate purpose.

By our statutes, when mills are erected by the owner of the land, or others by his consent, the proprietor of the mill is entitled to flow the lands of another, paying the damages occasioned by the flowing.

To ascertain the amount of the injury, a suit, in the form of a complaint, may be prosecuted against the proprietor by the person sustaining the damage, to be served, prosecuted, and defended, as other civil suits.

If upon the trial the right to flow without damage is not sustained, the court shall appoint three commissioners to make a true and faithful appraisement of the yearly damages, and how far the same may be necessary, and what portion of the year; and if either party object to the report of the commissioners, the case shall be submitted to a jury, and the report be offered in evidence, subject to be impeached as other testimony; and the verdict and judgment thereon, or on the report if not objected to, shall be final; and the party prevailing shall recover his costs.

These yearly damages may be recovered in an action of debt, and the mill owner is to give security for them, or receive no benefit from the adjudication, which is understood to be a bar of a suit at common law.

This process may be revived by either party to *increase* or *diminish* the damages, in which the prevailing party recovers costs. To prevent this, the mill owner may *tender*, and the owner of the land may *offer to receive*, the sums each respectively may deem adequate, and if the tender or offer shall, in the opinion of the jury, be deemed sufficient, the party refusing is condemned in costs.

No suit is to be brought to increase or diminish the yearly damages, until one month after they shall become due.

These statutes of flowing, though it is probable that they were intended originally to protect and encourage the owners of *grist mills*, are understood to extend to all other mills carried by water.

SECTION II. — WILD ANIMALS.

These, so long as they are reclaimed by the art and power of man, are the subject of a *qualified* or *precarious* property. *Mere pursuit* gives no property, and an animal *wounded* does not thereby become the property of the hunter. Finding a tree on another's land with *bees* in it, and marking it, gives no property in the honey to the finder. The bees are not his property until actually "hived."

Domesticated birds, such as geese, ducks, turkeys, &c., belong to the owner, wherever found, so long as they retain the disposition to return; and if they escape into another's enclosure, this gives him no right to kill them, as wild animals. An erroneous opinion has prevailed, that these animals, when found out of the enclosure or immediate care of the owner, may be killed as wild game, and that this was the only remedy for injuries or trespasses committed by them on another's property. But until they have *become wild*, they belong to the owner, and he may reclaim them as other living animals, and is alike liable for injuries done by them.

SECTION III. — GOODS LOST OR ABANDONED.

The common law doctrines in regard to shipwrecks, have been much qualified by our statutes. The Governor, with the advice of Council, is authorized to appoint a suitable number of *commissioners of wrecks and lost goods*, who hold their offices during pleasure, and are to be sworn and to give bond with sureties to the Judge of Probate of the county, for the faithful discharge of their duties. Each commissioner, on receiving information of wrecked property of \$100 or more, is

to take it into custody and preserve and secure it for the owner. He is to take an inventory of it, and when required by the owner shall, under oath, deliver it over, on being paid his reasonable compensation, which is to be determined in the mode particularly prescribed. Any other person intermeddling with the property after it is in the charge of the commissioner, forfeits \$1000.

The commissioner, on arriving at the wreck or goods found, shall immediately publish a particular account, under a penalty for neglect.

He may dispose of so much of the property as will pay the custom-house dues, for which he shall become responsible, and if it is perishable, he may dispose of the whole at auction. Fair notice is to be given of the sales, and if no owner or person interested appears in a year, the commissioner is to make, on oath, an inventory or account of sales, duties deducted, and pay over the balance to the Treasurer of the State, who is to make him a just and equitable allowance for his services and expenses. If the commissioner shall fail for sixty days after the expiration of the year to inform the Treasurer or to pay over, the Attorney General is to institute a suit to recover the amount from such commissioner to be paid over into the Treasury.

In cases of goods or money lost, or stray beasts, the statutes have provided how notice shall be given by the finder, and the value appraised, and if no owner appears in *a year and a day*, one half the property is to go to the finder, and the other to the town treasury. If the owner appears within the time, restitution is to be made on payment of expenses.

SECTION IV.—JOINT OWNERSHIP.

Personal property may be held in *joint tenancy*, in which case "the longest liver takes the whole." It is a general principle of English law, that a gift or grant to two or more, of a

chattel interest, creates a joint tenancy. But as the forbidding doctrine of survivorship would tend to damp the spirit of enterprise, it cannot apply to stock used in any joint undertaking of trade or agriculture. And inasmuch as our statutes have provided, in regard to *real estate*, that unless the intention is *clear* and *manifest* to create a joint tenancy, it shall be taken and held as an estate in common, it would seem that the same repugnance at survivorship would influence our courts, in cases of personal chattels. It has, indeed, been long since the doctrine, that, for the benefit of trade, the custom of merchants excludes survivorship. And it is now settled that stock used in a joint undertaking, by way of partnership in trade, is always considered as held *in common*. Still, this principle cannot well apply to partnerships which are merely *professional*, such as those of physicians, surgeons, lawyers, &c., where the heir, devisee, or assignee could not come in as a joint manager of the concern.

SECTION V.—PROPERTY IN ACTION.

This consists of personal rights, not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages for breach of covenant, or for detention of chattels, or for torts, are *things in action*. Most questions litigated in the courts are to be referred to this head of *personal rights in action*. So long as *credit* is deemed essential to prosperity, contracts must be made, and, in the vicissitudes of life, a portion of them must be broken, violated, or evaded; and so long as man is what he always has been—often weak and sometimes wicked—injuries will be inflicted, and damages must be given, as a compensation or equivalent. Wherefore *personal rights in action*, or claims for breach of contract or for other injuries, are subjects copious and extensive.

SECTION VI. — CHATTELS IN REMAINDER.

The limitation over in remainder is good as to every species of chattel; and there is, in this respect, no difference between money and every other chattel interest. Though the property be *perishable*, it still may be bequeathed for life with remainder over, but, as it becomes less valuable from year to year, it may, under the direction of chancery, be converted into government or other stocks, for the protection of him in remainder. But there is necessarily an exception, in case of such specific and perishable things as corn, hay, fruits, &c., of which the *use* consists in the *consumption*.

A chattel cannot be entailed but in special cases, and it is a settled rule, that the same words which would create an entailment as to freehold, would give the absolute interest in a *chattel*.

It is a rule in chancery, that in case of real danger from tenant for life, that the property will be wasted, the remainder man may have security. And when there is a general bequest of a residue for life, with remainder over, the property may be sold and converted into money, by the executor, and the proceeds safely invested and the interest paid over to the legatee for life.

CHAPTER THIRD.*

TITLE TO PERSONAL PROPERTY BY ACQUISITION.

SECTION I. — OCCUPANCY.

The strongest cases of title by occupancy are of fish taken in the seas, or other waters. Wild beasts and fowls, when taken, belong to the taker, as first occupant; but these may be so far reclaimed, or under the power of man, as to become his exclusive property.

This title to a chattel, by occupancy, is limited to very few cases. Goods captured from an enemy in war and wrecks and lost goods are all regulated by law, and the title is changed, not to the captor or finder as first occupant, but, by process of law, to the State, or is sold and the avails are, *in part*, assigned to the captor or finder. The transfer of title in these cases, therefore, is by act of law.

SECTION II. — ACCESSION.

The *increase* of sheep or cattle leased for a limited time, belongs to the lessee, who is regarded as the temporary proprietor. But in these leases of stock among agriculturists are, usually, particular provisions in regard to the offspring.

If one man, by his labor, unites his materials to those of another, and those of the former are the principal materials, the whole belongs to him.

* Kent's Com. Chitty's Blackstone.

If one repairs his vessel with another's materials, the property in the vessel remains in him who repairs, but if he builds from the hull with the materials of another, the property belongs to the owner of the materials.

If a man builds a house on the land of another, the property belongs to the owner of the land by right of accession. So, if he builds a house on his own land with the materials of another. The rule, however, in regard to building a house on another's land, is subject to many exceptions.

But in case of painting a fine picture on the canvass of another, the material bears so small a proportion to the work, that the whole would belong to the painter.

But if the material be taken wrongfully, the trespasser, whatever value he may add, gains no title. The owner of the property, unless it be so disguised by the alteration that he cannot define it, may seize it as his own.

If my trees are cut down, and sawed and split into shingles, this does not change the right of property. Yet, if they are nailed on to the roof of a house, it would seem that I could not take them off.

And if corn be taken and made into meal, or grapes into wine, it is said that the form is so changed that the original owner cannot claim the property. Cases may occur which it would be very difficult to assign to either description. No line of distinction has ever yet been drawn, and none, perhaps, ever can be, which would include, entirely, either class of cases.

In the case of *confusion* of goods, if the property of two be so intermixed as that each part cannot be distinguished, and the intermixture was by consent, the parties are tenants in common. But if the confusion is the act of one, without the consent of the other, the person who is the wilful cause, forfeits his interest. Still, if the property so intermixed is of equal value, it would seem to be no forfeiture. But in all other cases, the party guilty of the fraud must distinguish his own or lose it.

Acquisition by intellectual labor, has been noticed in the enumerated powers of the General Government, in Chap. VIII, Sec. IV—of authors and inventors.

CHAPTER FOURTH.*

TITLE BY ACT OF LAW.

SECTION I.—FORFEITURE.

Forfeiture of goods and chattels takes place, by the laws of England, upon *conviction* of the following crimes :—1st, *High Treason*, or *misprision of treason*. 2d, *Petit Treason*. 3d, *Felony, in general*, including *felo de se*. 4th, *Manslaughter*. 5th, *Excusable homicide*. 6th, *Outlawry*, for treason or felony. 7th, *Petit larceny*. 8th, *Flight in treason*, though the party be afterwards acquitted. 9th, *Standing mute when arraigned for felony*. 10th, *Drawing a weapon upon a Judge*, or *striking any one in the presence of the King's Court*. 11th, *Pretended prophecies* (second conviction.) 12th, *Owling* (exporting wool.) 13th, *Artificers residing abroad*. 14th, *Challenging to fight*, on account of money lost at gaming.

By the laws of this State, the cases of forfeiture of goods and chattels, for crimes, are few indeed. For misprision of treason, the offender is to forfeit to the use of the State all his goods and chattels, absolutely, and the profits of his lands during his life. This law, however, is, since the provision in the Constitution and laws of the United States in regard to treason, become, as it were, *obsolete*.

In the case of *outlawry*, however, the person, in addition to other disabilities and liabilities, forfeits the *issues* and *profits* of all his real estate during life, if the outlawry remains so long in force.

* Const. and Laws U. S. Const. and Laws Maine. Decisions S. J. C. Maine. Ed. Encyclop.—title Law. Chitty's Blackstone.

By the Constitution of Maine, "the Legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts"; and no *attainder* shall work corruption of blood, nor forfeiture of estate.

For minor offences, such as violations of the inspection laws, the articles to be inspected may be seized, and upon process prescribed, become forfeited.

By the statute law of the State, whenever personal property, liable to forfeiture, shall be seized, it is to be safely kept until a final decree, unless the owner or claimant give bond, with sureties, to pay the appraised value, if it should be decreed forfeited. Provision is made for appraisal, and the libel is to be commenced before a justice of the peace, if the appraisal does not exceed twenty dollars, otherwise at the State District Court. The notice, mode of proceeding, judgment, and appeal, are all prescribed, and a final decree of forfeiture transfers the property.

The Constitution of the United States speaks of forfeiture but in one case. Congress shall have power to declare the punishment of treason, but no *attainder* of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted; but the law prescribing the punishment for treason, does not include *forfeiture*. Forfeitures, of ships, vessels, boats, and other craft, with their cargoes, are imposed for importing, exporting, or transporting, in violation of the revenue laws of the United States. But as the penalties often operate with great severity, authority is given to the Secretary of the Treasury, and to the President, to remit or compromise; but no remission can be made of that part of the forfeiture claimed by the prosecutor or informer, after information given or prosecution commenced.

These forfeitures, after deducting charges, are to be disposed of, one half to the United States, and the other in equal proportions between the collector, naval officer, and surveyor, or to such of them as there may be. But where the recovery is upon information given by some person other than an officer, the forfeiture accruing to the officers is divided equally between

them and the informer. When the information is given by officers of a revenue cutter, one fourth goes to the United States, one fourth to the officers of the customs, and the remainder to the officers of the cutter, in proportion to their pay. And in case of any seizure where the value is less than two hundred and fifty dollars, the United States' share is made subject exclusively to the costs of prosecution. Ships and vessels violating the navigation laws, are, upon seizure and condemnation, *forfeited*, and a sale transfers the property, and converts a foreign into an American vessel, if the purchaser is a citizen of the United States. Ships and vessels, with their cargoes, appurtenances, &c., taken from an enemy in war, if of equal or superior force, are adjudged to the captors *in whole*, if of inferior force, *one half* to them, and the other to the United States. These, upon seizure and condemnation, are sold, and may, by purchase, become United States vessels.

SECTION II.—JUDGMENT AND EXECUTION.

The attachment laws of this and others of the New England States have been often the subject of animadversion, especially those which relate to real estate.

The attachment of personal property upon mesne process, is for the security of the debt or damages, and probable costs, and the property is to be held thirty days after final judgment, and if not taken in execution in that time, it is released from the attachment.

Shares in incorporated companies, and the franchises of such companies, may be attached on mesne process, to satisfy any execution which may issue on the judgment; and these attachments are effected by a copy of the process left with the clerk.

All attachments hold the property thirty days after judgment, against all other creditors or subsequent attachments or transfers; and executions may issue on any final judgment after

twenty-four hours and within one year. After the year, the judgment must be revived by action of debt or *scire facias*.

Personal property seized or taken on the execution, may be sold by the officer at the expiration of four days, notice of sale to be given forty-eight hours within the four days.

Shares in or franchises of corporate companies, to be sold after thirty days' notice.

Corporations may, however, redeem franchises sold on execution, in three months, by payment or tender of the amount paid by the purchaser, and interest at twelve per cent.

If, on the sale, there remains after payment of the execution, a surplus in the officer's hands, he shall hold it subject to other attachments, according to priority ; or, in case of no other, to satisfy other process on executions in his hands against the same debtor. After all these other claims, or in case of none, the surplus is to be paid over to the debtor.

Attachments are not dissolved by the death of either party, except the estate be represented insolvent, and a commission of insolvency shall have issued.

In case of a wrongful possession of personal property, and a recovery of damages to the value, the property is *transferred* to the trespasser or wrong doer—but whether by the *judgment* or *satisfaction* of it, does not appear to be settled. If the person injured loses his title to the property taken, it must be either because he is satisfied in damages, or that he *seeks* such satisfaction. Upon this last hypothesis, he ought to be divested the moment he commences his suit for *the damages*. It is at *his election* that he commences his suit, as well as takes judgment. Neither remunerates him for the injury, and both are only proceedings for remuneration ; neither, however, is an election to abandon the property ; and nothing, it would seem, can transfer it to the wrong doer, but a satisfaction in damages to the full value.

SECTION III.—INSOLVENCY.

There are no insolvent laws, as such, in Maine, as between debtor and creditor; that is, none which authorize a discharge of the debtor's liability on his disclosure and delivery up for the benefit of his creditors.

When the estate of a *deceased* person is insufficient to pay the debts, the Judge of Probate, upon the representation of the executor or administrator, shall appoint two or more commissioners of insolvency to receive and examine all the claims of the creditors, and they shall present, on oath, a list of the claims allowed, to the Judge; and after deducting their compensation, and the expenses of administration, the wearing apparel, and such other allowances as the Judge may order to the widow, taxes, and debts due the State, and incurred in the deceased's last sickness, and funeral expenses, the rest is to be distributed among the creditors in proportion to their respective claims allowed.

Upon a *representation* of insolvency, all suits pending are continued, and upon an *actual* insolvency all attachments are annulled. Persons not making out their claims to the commissioners are barred, unless they discover other property than that inventoried or accounted for, or the estate turns out to be solvent.

In these cases of insolvency, the whole estate, real and personal, is disposed of to meet and satisfy the claims allowed.

The proceedings upon insolvent estates are particularly set forth under the title "Courts of Probate."

SECTION IV.—INTESTACY.

The intestate's personal estate is to be distributed—1st, to the widow, her wearing apparel, according to her degree, and

such other and such further necessities as the Judge shall order, having regard to the family under her care ; 2d, to the discharge of debts and expenses ; 3d, the residue among the same persons and in the same proportion as the real estate. But the husband is in all cases entitled to the residue ; and if there be a widow and issue, she is entitled to *one third* ; if no issue, to *one half* ; and if no other kindred, to *the whole*.

[See Book IV, Chap. VIII, Sec. II.]

CHAPTER FIFTH.*

TITLE BY ACT OF PARTIES.

SECTION I.—GIFT.

A gift of personal chattels, is the act of transferring the right and possession of them, whereby one renounces and another immediately acquires all title and interest therein. This may be done by *writing*, or *parole*, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential.

But such conveyances, when merely voluntary, are suspicious, and usually construed to be fraudulent, if creditors or others become sufferers thereby.

Gifts for the use of the donor are void.

Most of the doctrines concerning voluntary settlements of real estates, and the presumptions of fraud from them, are

* Powell, Pothier, Comyns, and Chitty, on Contracts. Kent's Com. Jones and Story on Bailments.

applicable to chattels ; and a gift of them is equally fraudulent, and void against existing creditors.

A voluntary conveyance, if made with fraudulent views, would seem to be void, even as to *subsequent* creditors ; otherwise if there was no fraud in fact.

Gifts *causa mortis*, under expectation of immediate death, are good with *delivery*. The donor must have made them in his last illness, and in contemplation of immediate death, and with reference to their effect after death.

Things in action, as notes, bonds, and mortgages, may be given in this way with delivery.

SECTION II.—CONTRACT AND SALE.

1. A *sale*, or exchange, is a transmutation of property from one man to another, in consideration of some price or recompense in value. There is no sale without a recompense.

“A *contract* is an agreement upon sufficient consideration to do or not to do a particular thing.” By the code Napoleon it is defined “an agreement by which one or more persons bind themselves to one or more others to *give*, to *do*, or *not to do* something.”

Contracts are either *executed* or *executory*. A deed of conveyance of real or personal estate, is a contract *executed*. A promise to pay or deliver is *executory*—a property not in *possession*, but in *action*.

Contracts are either *express* or *implied*. The former where the terms, either verbal or written, are openly uttered ; the *latter* such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a man to do certain work or labor without an agreed price, the law presumes a promise to pay him as much as he reasonably deserves. As a general rule, promises, in law, only exist where there is no express stipulation between the parties.

By the statute of the 6th March, 1821, "to prevent frauds and perjury," it is enacted "that no contract for the sale of any goods, wares, or merchandize, for the price of thirty dollars or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

It is also provided by the same statute, that promises by an executor or administrator to pay a debt or damages out of his own estate, or of any one to pay for the debt or default of another, or upon agreements in consideration of marriage, or which are not to be performed within the year, or for sale of lands, &c., or any interest therein, are void without some note or memorandum in writing.

Contracts are either by *specialty*, viz. by deed under seal, or by *parole*, viz. either verbal or by writing not under seal.

2. The *parties* to a contract are the person who undertakes to do or forbear, and the person in whose favor the engagement is made. Generally speaking, all persons, except married women and infants, having capacity and understanding, may contract; and in particular cases, married women and infants are not excepted.

3. A *consideration*, or something given in exchange, is essential to the validity of every *parole* contract. But it is otherwise in case of *specialty*.

Mutual promises, if made at the same time, are valid, as one promise is a consideration for the other.

A consideration executed, will not sustain the promise, unless it was undertaken at the express or implied request of the party promising. For if you do me a favor *gratuitously*, my subsequent promise to respond will not obligate me. But if one is under a *moral* but not *legal* obligation, such as to pay a debt barred by the statute of limitations, this consideration supports the promise.

4. *Illegal* contracts are void—such as are against *good morals*,

in restraint of trade or marriage, for maintenance of suits, to prevent the due course of justice, trading with an enemy, wagers, usury, &c.

5. As a general principle, a contract binding where it was made is good every where, and the law of the place operates equally as to its discharge. But the law of the place where the *remedy* is sought is to govern in regard to *that*.

6. An intentional concealment of facts known to one party and not to the other, where both have not the same means of information, will avoid the contract. But when the means of information are equally open to both, a disclosure is not presumed to be necessary.

7. *Delivery*, in many of the States, is essential to the validity of a sale. In Maine it is not *indispensable*, although the want of it is a strong feature of fraud.

Delivery, however, to a servant or agent, a carrier or master of a vessel, is equivalent. So, consignment of a bill of lading vests the property in the consignee.

If the contract be to deliver specific articles, and no place is designated, the obligor is not bound to carry them in search of the obligee, but he must call on him to designate.

If a debtor *assigns* his property, reserving any thing to be paid back to *himself*, the assignment is fraudulent.

The auctioneer has not only the *possession* of the goods, but has an interest in and *lien* upon them.

The *vender* has a right to stop the goods *in transitu*, for his lien for payment, and if he has been paid in part, he may stop for the balance. The whole must be paid for before the right ceases.

But this right is limited to the vender (or consignor, if substantially vender.)

A demand of the carrier is equivalent to a stoppage *in transitu*.

This right ceases by an actual delivery to the vendee, or circumstances equivalent. If the vender has given the vendee documents sufficient to transfer the property, *such as an assignment of the bill of lading*, and he sells *bona fide*, the right to stop *in transitu* ceases.

8. *Interpretation of contracts.* When the terms are ambiguous, the object should be to ascertain the mutual intention of the parties, and, to this end, the whole instrument is to be taken together.

The law of the place, the usages of trade, the language in reference to these, the terms to be taken most strongly against the person using them—are all principles in expounding and interpreting contracts.

SECTION III. — BAILMENTS.

“*Bailment* is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purpose of the bailment shall be answered.”

1. In cases where the trust is for the benefit of the bailor, the bailee is answerable only for *gross* neglect.

“Gross neglect” is the omission of that care which a very careless man would take of his own property.

2. Where the trust is for the benefit of the *bailee*, he is answerable for *slight* neglect.

“Slight neglect” is the omission of that care which a very careful man would take of his own property.

3. Where the trust is for the benefit of both parties, the bailee is answerable for *ordinary* neglect.

“Ordinary neglect” is the omission of that care which a man of common prudence would take of his own property.

The undertaking to do an act without reward is of the first class; using property loaned, without paying for the use, is of the second; and pledges for payment of debts, and letting for hire, of the last.

But *inn-keepers* and *common carriers* are exceptions, for though the property entrusted is for the mutual benefit of the parties, still they are answerable for all casualties, those caused by the act of God or the enemies of the State excepted.

The inn-keeper is responsible, even for the acts of his servants and domestics. But if his guest orders his horse *to pasture* and he is stolen, the inn-keeper is responsible only for ordinary neglect.

Special notices, however, such as are often given by stage and steamboat carriers, limit the responsibility.

SECTION IV. — DEVISE.

Devises of real and personal estates are, with few exceptions, placed on the same footing and require the same solemnities. Any *owner* of personal estate, of twenty-one years of age and *of sane mind*, may dispose of it by last will and testament. All wills must be in writing, signed by the testator or by some person in his presence and by his express direction, and attested and subscribed by three credible witnesses in the presence of the testator; and no will can be revoked but by the same solemnities, or by destruction by the testator or by his direction.

Soldiers in the military service and mariners or seamen at sea, may dispose of moveables, wages and other personal estate, as they might have done before the passing the statute of wills.

No *nuncupative* will, where the value disposed of exceeds one hundred dollars, shall be valid unless it be proved by three witnesses, present at the making, nor unless it be proved that the testator at the time bade the persons present or some one of them to bear witness, nor unless it were made in his last sickness and in the house of his habitation or dwelling or where he had been resident for ten days at least, except the person was unexpectedly taken sick and died from home.

Such will is not to be approved until after fourteen days and notice. After six months the will shall not be proved unless the words were reduced to writing within six days.

Legacies to the witnesses are to be void and not to affect their competency. Creditors whose debts are secured by a charge upon the real estate devised, and legatees having first received, released or refused their legacies, are competent witnesses. So a legatee dying before the testator, his attestation is good as that of any other deceased witness.

A feme covert may make a will of personal estate with the consent of her husband, but not of her real estate. Still if the right is reserved by the marriage articles she may dispose of any estate by will.

If a *non compos*, under guardianship, be restored to his reason he may make a will, though the guardianship be not revoked.

Though the revocation requires the same solemnities as the execution, still subsequent alienation of real estate by the testator is a revocation as to the part alienated. But it may well be questioned whether a disposition of a portion of the *personal estate* would not be a revocation as to the rest, especially if it essentially changed the distribution.

An essential alteration in the testator's circumstances, such as marriage and birth of a child, is an implied revocation. But in this case, the will made before marriage must have disposed of the whole estate.

The probate of a will by a court of competent jurisdiction is conclusive upon all persons having notice, claiming as heirs or devisees, and no question as to the due execution of the will, sanity of the testator or the attestation of witnesses, can afterwards be raised in a court of common law.

When a will is originally proved and allowed in any other State or country according to its laws, the filing and recording it here agreeably to a decision of the Judge of Probate, upon notice and proceedings according to the statute, it is a good disposition of the estate *here*, provided it is attested and subscribed as the laws of this State direct.

A will must receive such construction that the *intention* of the testator, when it can be discovered, shall be carried into effect, if it can be done consistently with the rules of law; and to this end, the law dispenses with the use of words in devises

which are absolutely requisite in other instruments. Thus a fee may be created without words of inheritance, and an estate may pass by mere implication. As a devise to the heir *after the death of the wife*, gives an estate to her by *implication*. The intention of the testator is to be gathered from the whole will taken together, and where two clauses in a will are repugnant to each other, as a general rule, the latter must prevail.

Parole evidence is admissible where there is ambiguity as to the person of the devisee or legatee, and also in regard to the subject matter of the devise—also as to facts which were known to the testator and which may reasonably be presumed to have influenced him in the disposition of his property.

But the declarations of the testator are not admissible to control the import or give a different meaning to the words of a will.

The legal construction of a will is exclusively a subject of common law jurisdiction.

CHAPTER SIXTH.*

COPARTNERSHIP.

Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade.

* Kent's Com. Story's Equity. Chitty's Black. Gow on Partnerships. Stat. Maine.

SECTION I.—THE CONTRACT OF PARTNERSHIP.

The contract of partnership is either *public* or *private*. It is *public* where the association consists of an indefinite or a large definite number of individuals of joint undertakers; and *private*, where a few individuals only connect themselves together. The first is called a company, and usually acts under an incorporation by authority of the Legislature. Private partnerships may be formed by positive agreement, or by acts which imply such agreement. Written articles are not essential—trading jointly is sufficient. Persons having a mutual interest in the profits in the *subject matter*, are partners, whatever their motives; but a joint possession does not of itself convert the possessors into partners.

Executors or administrators of deceased partners do not succeed to the condition of partners; though a community of interests necessarily exists until the affairs of the firm are wound up.

Partnerships for unlawful trade are *invalid*.

Partners cannot engage beyond the original object without the consent of all; and an offer to indemnify the partner dissenting will not alter the case.

Though, as to creditors, each is liable for the whole of the partnership debts, yet as it regards the other copartners, each is only responsible for his aliquot part.

But by an act of this State, of 15th March, 1836, limited partnerships are authorized and regulated, and it is provided that the *special partners* may contribute specific sums and are not to be liable beyond the stock which each shall furnish.

The partners shall severally sign a *certificate* describing the whole undertaking, which shall be acknowledged and recorded in the registry of deeds in each county where the business is transacted, and published in the newspapers; and the same proceedings are to be had in cases of *renewal*.

The business is to be carried on in the name only of the *general partners*, and if a special partner consents to the use of his name in any way, he becomes responsible as a general partner. The capital stock is not to be reduced during the term below the sums *certified*; nor is any dissolution to take place before the end of the term without notice as is prescribed for the commencement.

Whoever is interested in the profits is a partner, but here a nice distinction has been made. An interest in the profits themselves, *as profits*, makes the recipient a partner, and the payment of a given sum in proportion to a given *quantum* of the profits as a reward of and as a compensation for labor, does not.

A retiring partner who receives an annuity fairly proportioned to the interest he possessed in the profits and "good will," at the time of his secession from the partnership, is absolved from continued responsibility to third persons, provided his retirement is made sufficiently notorious.

If a man have an apparent interest in the concern, it makes him responsible as a partner.

SECTION II.—INTERESTS OF PARTNERS IN THE STOCK.

Partners are joint tenants, without the benefit of survivorship; that is, each has a joint interest in the whole, but not a separate interest in any particular part of the partnership property.

When the partnership property is invested in real estate, the partners are tenants in common without regard to the form of conveyance; and though courts of law must look at the legal estate only, yet equity will effectuate the intention of the parties and decree the person holding the legal estate as trustee for the concern; and the *purchaser, with notice*, would be liable in equity.

SECTION III.—ACTS OF THE MEMBERS UPON THE FIRM.

It is a settled principle that one partner may by his own acts bind his copartners in all transactions relating to the partnership.

This power of a single member of a firm is not confined to *negotiable paper*, but extends to every contract or engagement which has reference to the partnership.

If one purchases an article on his own private account, within the scope of the partnership, the firm is liable, unless the seller had notice at the time that it was a private transaction.

It would seem that one partner cannot, without express authority, guaranty the debt of a third person.

And it is said that a partner may interfere and arrest the firm from effectuating an inchoate purchase.

SECTION IV.—DISSOLUTION OF THE PARTNERSHIP.

If the partnership is for no definite period, any member may dissolve it at a moment's notice.

The partnership ceases as soon as the object is completed. Also at the end of the definite period.

By the voluntary act of the parties.

By the death, insanity, bankruptcy, or other disability of a member.

Death of one dissolves the whole, unless there is provision in the contract for survivorship.

Marriage of a *feme sole* copartner dissolves the firm.

The acknowledgment of an antecedent debt, by one partner, if *before* dissolution, will take it out of the statute of limitations, *but not afterwards*—for the power of one partner to bind the firm ceases at the dissolution.

Notice of a dissolution, actual or presumptive, is necessary and effectual. But if the retiring partner willingly suffers his name to continue in the firm, he is holden notwithstanding such dissolution.

CHAPTER SEVENTH.*

NEGOTIABLE PAPER.

A bill of exchange is an open letter of request from one person to another, desiring him to pay a sum of money to a third person, or order, or it may be to bearer.

A promissory note is a written promise from one person to another, to pay him or order, or bearer, a sum of money at all events and without fail.

SECTION I.—THE ESSENTIAL QUALITIES.

When a bill is drawn on a foreign country, or made payable in a foreign country, it is called a “foreign bill of exchange.” But if both drawn and made payable in this country, it is an “inland bill of exchange.”

The person who draws it is the *drawer*. The person on whom it is drawn is the *drawee*, and if he accepts it, the *acceptor*. The person to whom the bill is made payable is the *payee*. If he *endorse* it, he is the *endorser*, and the person to

* Kyd and Bayley on Bills. Kent's Com. Stat. United States and Maine.

whom it is transferred by the endorsement is the *endorsee*. Any person having it in his possession, claiming an interest in it, is the *holder*.

In general, *infants* and *married women* cannot draw bills that would be valid ; but if the drawee accepts, he will be holden to the payee, though the drawer will not be bound to the acceptor for the contents. A bill drawn in favor of a married woman or an infant will be good, and the endorsee may recover of the acceptor, without remedy upon the endorser.

During a copartnership, a bill drawn by one of the partners for a transaction relating to the joint concern, will bind all.

By drawing a bill, the person undertakes that the drawee will accept it when presented, and pay it when it becomes due to any legal holder, provided it is presented for acceptance and payment at the proper time and place ; and for any default, is liable to the holder or to any endorser from whom the holder first recovers, with damages.

As soon as a promissory note, payable to A or order, is endorsed, it resembles a bill of exchange. The *endorser* becomes the *drawer*, the *endorsee* the *payee*, and the *maker* the *drawee with acceptance*.

SECTION II.—RIGHTS OF THE HOLDER.

If the bill be not accepted, the holder may call upon the drawer before it is due, and if it be accepted and not paid when due, the drawer is liable in the same manner for the amount and damages. These will be measured by the laws of the country where the bill is drawn, but the *contract itself* will be considered according to the laws of the country where it is to be paid.

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer or endorsed in blank, and the holder can recover upon it, provided he took it in the course of trade, and for a valuable consideration.

There are *two cases*, however, where a bill is void in the hands of an innocent endorsee, *to wit*, where the consideration is for *gaming* or *usury*.

This provision, however, in favor of a *bona fide* holder, does not apply to a case between the original parties; but the consideration may be inquired into, between maker and payee, or endorser and endorsee, and in any case where an endorsee takes paper under suspicious circumstances, as, if it be over due, he takes it at his peril.

SECTION III.—THE ACCEPTANCE.

Bills payable at sight must be presented within a *reasonable time*; if payable in a given time, they must not be presented before the day of payment. But when presented, and acceptance is refused, they are *dishonored*, and notice must be given to the drawer.

“Sixty days after sight,” means sixty days after acceptance.

If the acceptance be *qualified*, varying the absolute terms of the bill in sum, time, place, or mode of payment, the holder is not bound to receive it. But if the acceptance be special, it binds the acceptor *sub modo*.

A *promise* to accept will amount to an acceptance in favor of the person to whom the promise was communicated, and who took the bill on the credit of it. Every act giving credit to a bill amounts to an acceptance. The holder may take a *qualified* acceptance, and the acceptor will be held according to the terms of his acceptance.

The acceptor is the principal and the drawer the surety. A stranger or third person may become a party to the bill by accepting it for the honor of the drawer.

SECTION IV.—ENDORSEMENT.

A valid transfer may be made by the payee or his agent. If a *feme sole* payee or endorsee afterwards marry, the right to endorse belongs to the husband. The endorsement by a member of a firm or mercantile house, binds the partners.

A blank endorsement passes the note by delivery like one payable to bearer.

The holder may strike out the endorsement to him, though full, and all prior endorsements in blank, except the first, and charge the payee or maker.

A bill once negotiable is always so, unless the general negotiability be restrained by a special endorsement by the payee.

If a blank note or check be endorsed, it will bind the endorser to any sum or time of payment which the person entrusted chooses to insert. In such cases, possession is evidence of title.

When a note, payable on demand, is to be deemed “out of time,” is a question of law, and every case must depend upon its own peculiar circumstances. In case of unreasonable delay by the holder, the endorser is discharged.

An endorser may, by the terms of the endorsement, exempt himself from liability.

SECTION V.—DEMAND AND PROTEST.

The demand of acceptance of a foreign bill is usually made by a notary, and in case of non-acceptance, he makes his notarial protest, which receives credit in all courts. It is a requisite step, and must be made promptly upon refusal.

This protest is unnecessary on inland bills. After the protest immediate notice must be given to the drawer and endorser.

On refusal of acceptance the drawer or endorser may be sued, without waiting for a presentment for payment.

But if the bill has been accepted, demand of payment must be made when it falls due. Due diligence must be used to find out the party and make the demand. If a promissory note be made payable at a particular place, the demand must be made there.

When the drawer has no funds in the hands of the drawee, when he absconds, or waives the right, or when a partner draws a bill on the firm, notice of the dishonor is unnecessary.

Notices should be sent the next day after the dishonor if sent by mail, and it is usual to allow each endorser one day to notify those preceding him.

SECTION VI.—DAMAGES.

By the statute law of Maine, when any bill of exchange drawn or endorsed within this State, payable at any place without the State and within the limits of the United States and Territories, which, upon being duly presented for acceptance or payment, shall not be accepted or paid according to the order of the bill or terms of acceptance, and shall be regularly protested, every drawer or endorser within the State, liable by law for the contents to any holder or party thereto, shall, in addition to the contents, costs and interest, be liable for damages at the following rates:—Upon all such bills payable in either of the other New England States or New York, *three per cent.*; within the States of New Jersey, Pennsylvania, Delaware, Maryland and Virginia, or District of Columbia, *five per cent.*; within the States of North and South Carolina or Georgia, *six per cent.*; and within any other of the United States or Territories, *nine per cent.* on the amount of the bills.

And when any bill or order for the payment of money, for \$100 or upwards, drawn or endorsed and payable within this

State, seventy-five miles or more distant, shall not be accepted or paid, the drawer or acceptor shall be liable in damages to *one per cent.* in addition to principal, interest and costs.

Notaries public are to go in person with the bill or note to the drawee or maker, and on refusal to accept or pay, are to make protest, stating the neglect or refusal, and to enter of record a copy of the bill or note, and the reason of non-acceptance or non-payment.

In New York, bills drawn or negotiated on either of the New England States or New Jersey, Pennsylvania, Delaware, Ohio, Maryland, Virginia or District of Columbia, the damages for non-acceptance or non-payment are *three per cent.*; on North and South Carolina, Georgia, Kentucky and Tennessee *five per cent.*; and elsewhere in America north of the equator, or in Europe, *ten per cent.*, in lieu of interest, charges and expenses.

CHAPTER EIGHTH.*

SHIPPING AND SEAMEN.

SECTION I.—TITLE TO MERCHANT VESSELS.

Ordinarily a bill of sale is the true and proper muniment of the title of a ship or vessel, and which the maritime courts of all nations look to and require.

Possession, however, is presumptive evidence of title, and a sale and delivery without bill of sale would be good between

* Abbot on Shipping, Story's Ed. Kent's Com. Stat. U. S. and Maine. Decisions S. C. U. S., N. Y. and Mass. Reeve's History of the Law of Shipping and Navigation. Stevens and Benede, by Phillips.

the parties. On sale or mortgage, if the vessel is *in port*, a delivery is necessary—but if *at sea*, or the sale be by a part owner, the muniments of title are sufficient, unless the part owner be in the actual possession.

For the purpose of protecting our own navigation, our ships and vessels are required to have certain documents as evidence of their national character.

1. Ships employed in foreign trade, built in the United States and owned wholly by citizens, are entitled to be *registered*.

2. Ships so built and owned, and employed in the coasting trade and fisheries, to be *licensed* and *enrolled*.

3. Ships United States built, but owned wholly or in part by foreigners, to be *recorded*.

4. Ships built out of the United States, but owned by citizens, are entitled to a *certificate of ownership*.

Ships built out of the United States and owned by foreigners, are deemed *alien vessels* to all intents and purposes.

The third class pays a less tonnage duty, and is confined to vessels built after 15th August, 1789. What is the origin of *certificates* or, as they are sometimes called, *sea letters*, is difficult to determine. The issuing of these *sea letters* seems now to be prohibited by the act of Congress of 26th March, 1810. The acts of Congress speak of sea lettered vessels *owned by citizens*, and give them the privileges of *registered vessels*. They probably were vessels *foreign built*, but purchased by citizens, as substitutes for American vessels lost or condemned abroad—or foreign vessels shipwrecked or abandoned, and bought by citizens. The act of 26th March, 1810, has prohibited these sea letters altogether, with certain exceptions which can now have no application.

The want of the evidence of nationality does not work a forfeiture, but deprives the ship of her American character.

Ordinarily the collector of the port where the vessel belongs is the registering or enrolling officer, except that if the vessel is laying in another district she may be registered or enrolled there. The register or enrolment must state all particulars truly.

Registered ships, upon their registry being given up, may be *enrolled* and *licensed*, and *vice versa*. If this be done in another district, the change is to be transmitted to the Secretary of the Treasury, and on the vessel's return to her own district the register or enrolment is within ten days to be delivered up to the collector.

Every ship or vessel without the documents required by law is *foreign*, and to be dealt with as such.

An oath is required before registry or enrolment, and an admeasurement of the vessel. The admeasurement is made, if the ship be double-decked, by taking the *length* from the fore part of the main stem to the after part of the stern post, and the *breadth* at the broadest part above the main wales—half of which breadth shall be accounted the *depth*; and then deducting from the length *three fifths* of the breadth, multiplying the remainder by the *breadth* and the product by the *depth*, and then dividing this last product by *ninety-five*, and the quotient is the tonnage.

If the vessel be single-decked, take the length and breadth as above, deduct from the length three fifths of the breadth, take the depth from the under side of the deck plank to the ceiling in the hold, and multiply and divide as before, and the quotient is the answer.

The vessel must be wholly owned and commanded by a citizen of the United States. The American owner ceases to retain his privileges as such, if he usually resides in a foreign country, during the continuance of such residence, unless he is a consul, or an agent for and partner in some American house carrying on trade within the United States.

If a vessel is transferred by *process of law*, and the documents of registry, &c., are retained by the former owner, new ones may be obtained.

Every ship or vessel owned by an American citizen and bound to a foreign country, is entitled to a document of protection, termed a *passport*.

The owners of a ship are tenants in common. Each has his distinct though undivided interest. When one is appointed

to manage the concerns, he is *the ship's husband*. Still there may exist a copartnership.

If a majority in interest would direct the voyage, the admiralty will take a stipulation in behalf of the minority, that they will either bring back the ship or pay the minority the value of their shares, in which case the ship sails wholly at the risk of the majority.

The documents necessary for American vessels are—1st, The *passport*, or permission for the vessel to proceed on the voyage, which contains a description of the vessel, crew, &c. This is only necessary for vessels going to Europe. 2d, *Sea letter*, specifying the nature and quantity of the cargo and destination. This is only necessary for vessels bound to the southern hemisphere, and is usually in the English, French, Spanish and Dutch languages. 3d, *Register*, or proof of property, giving the *owners* and character and description of the vessel. 4th, The *list of the crew*, containing the names, ages, quality, residence and birth. 5th, *General clearance*. 6th, *Bill of health*. And, *on entering*, a list and particular description of the passengers.

The documents necessary as proof of *neutrality* are—1st, The *passport*. 2d, *Sea letter* or *sea brief*. 3d, The *proof of property*. 4th, The *muster-roll*, or *role d'equipage*. 5th, The *charter-party*, (when one is given.) 6th, The *bill of lading*. 7th, The *invoices*. 8th, The *log book*. 9th, The *bill of health*.

SECTION II.—PERSONS EMPLOYED.

The master is entrusted with the care and management of the ship, and his power and authority are so great, and the trust reposed in him is so important, that the greatest care and circumspection ought to be used by the owners in the choice and appointment.

He must be a person of experience and practical skill, as well as deeply initiated in the theory of navigation.

His authority at sea is necessarily summary, and often absolute, and he has the power to exercise it in a harsh, intemperate, and oppressive manner. In tempests as well as in battle, the commander of a ship must give desperate commands, and he must require instantaneous obedience.

But in proportion to his powers, are his responsibilities ; and his duties of kindness, decorum, and justice, are as imperative as his powers are transcendent.

He is, too, the confidential agent of the owners, and has an implied authority to bind them, without their knowledge, by contracts relative to the usual employment of the ship ; and whoever deals with him in this character has a double remedy—*viz.* on *him* and *his owners*, unless he stipulates against personal liability.

It is said he may by a charter party bind the ship in a foreign port, and even at home, if the owners' consent may be presumed.

He may bind them as to repairs and necessaries, even if he misapply the means, as the owners are answerable for the acts of their servant in those things that respect his duty under them.

But he has no lien on the ship or freight for his wages, and in this he differs from the others employed on board.

But the mate and crew contract with the master on the credit of the ship.

The carpenter has also a lien for repairs until he parts with the possession. The credits at the *last* port have priority.

The *pilot*, while on board, is master *pro hac vice*.

If after the voyage is commenced, the mate and a majority of the crew deem the vessel insufficient, the master must enter the nearest and most convenient port and obtain the judgment of experienced persons, whose decision shall govern as to the prosecution of the voyage.

SECTION III.—FREIGHT.

A *charter party* is a mercantile lease of the ship, and it describes the parties, ship, and voyage; and contains, on the part of the owner, stipulations as to sea worthiness, and the promptitude with which the vessel shall receive the cargo and perform the voyage, excepting perils of the sea, &c.; and on the part of the freighter, stipulations to load and unload within a given time, with allowance of so many *lay* or *running days* for loading and unloading the cargo, and the rate and times of payment of freight, and the rate of *demurrage* beyond the allotted days.

When the goods of *several*, unconnected, are laden on board, without any particular contract of affreightment with any individual for the entire ship, the vessel is called a *general* ship, but when one or more engages for the whole, she is a *chartered* ship.

The owner is bound to keep the ship in suitable condition during the whole voyage, unless prevented by the perils of the sea.

Latent defects are within the warranty. The responsibility of the owner begins where that of the wharfinger ends.

The owner is answerable as a common carrier for all losses but those arising from the act of God or the enemies of the State.

But by an act of this State, of 27th February, 1821, it is provided that owners shall not be liable for embezzlement by master or mariners, beyond their respective interests in the ship and appurtenances and freight—the *charterer* to be considered the *owner* within the meaning of the act.

In execution of the contract of charter party, the master of the ship signs a *bill of lading*, which is the acknowledgment that he receives the goods on board, and *that he assumes to convey them*.

If there are several bills of lading, each is a contract, but the whole make but one contract as to master and owners. But if several parts of the bill of lading be endorsed to different persons, a competition may arise for the goods; and the rule is, that (equities being equal) the property passes by the bill first endorsed.

Delivery is essential to freight; and if there is no agreement in the charter party, the amount is regulated by the usage of the trade.

The master may retain the goods until the freight is paid, but no action lies until a delivery. So a tender to the consignee, entitles to freight, where the government forbids the landing.

Perils of the sea embrace natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence, and a loss happening in spite of all human sagacity. The only exception to this definition is, that a loss *by pirates* is charged to a peril of the sea. Loss by fire, from *lightning*, is by a peril of the sea, but not by fire from any other cause.

No freight is due for goods which perish by the perils of the sea in the course of the voyage.

The ship owner performs his engagement when he carries and delivers the goods. He is not an insurer of the soundness of the cargo; for if liquids waste by leakage, &c., the owner is still entitled to the freight, provided they were well stowed. So of live stock which should die on the voyage, without any negligence of the master or crew.

If a ship, by reason of perils, goes into a port short of her destination, and is unable to prosecute her voyage, and the goods are there received by their owner, a *pro rata* freight is due—but there must be an acceptance at the intermediate port.

In cases of *collision of ships*, that which has the wind must get out of the way.

The ship on the *starboard tack* has a right to keep her wind, and that on the *larboard* is bound to bear up or heave to. When both vessels are in a narrow channel, and on the same course, the one *to windward* is to “keep away.” Where the

fault is equal, both are to contribute equally, without regard to their relative value.

SECTION IV. — AVERAGE.

If goods are thrown overboard in order to lighten a ship, the loss incurred for the sake of all, is to be made good by the contribution of all—or by “*general average*.”

They must be *thrown* over, and *in order* to lighten the ship—not by the caprice of the crew; the object must be the interest of all—not because the ship is too heavily laden for an ordinary voyage. The sacrifice of the goods, to entitle them to contribution, must have been the *price of safety*. The principle extends to goods belonging to the master and owner as well as the merchant, and also to the tackle and furniture of the ship.

Expense may become the subject of general average—as, if it becomes necessary to unlade the goods to repair damages. So the damages arising from a voluntary *stranding* to save the ship and cargo—even where the ship is totally lost and the cargo saved.

The expenses in port where the ship had taken refuge to repair the damages occasioned by a tempest, are the subject of general average.

It seems to be the prevailing doctrine, that during a detention by an embargo, the cargo and provisions of the crew are subjects of general average. Expenses incurred after capture in reclaiming the ship and cargo, if the expenses apply to the *whole property*, are to be charged as general average.

In adjusting the average, goods sacrificed, and those saved, are to be valued as at the port of discharge, deducting freight.

SECTION V. — SALVAGE.

Salvage is the compensation made to other persons by whose assistance a ship or its lading may be saved from impending

peril, or recovered after actual loss. It is chargeable upon the owners who receive the benefit, and who would have incurred the loss if it had not been prevented by the salvors. Where the amount is not fixed by positive law, it must be settled by the principles of maritime law, and it is rarely less than *one third*, nor more than *one half* the property saved.

If the salvage be performed at sea, or between high and low water mark, the courts of the United States exercising admiralty jurisdiction are supposed to possess *exclusive* cognizance of the subject, whatever may be the case as to *wrecks* on the *shore* of a State.

Persons belonging to the ship's crew, though ordinarily not entitled to salvage, may become so by services beyond the line of their duty, or when absolved from duty. It is the same with *passengers*.

The laws of the United States have established the following rules in regard to salvage for *re-capture*, where there has been no condemnation by competent authority.

Vessels and merchandize belonging to persons under the protection of the laws of the United States, taken by the subjects or citizens of a nation *belligerent*, or so far so as to be subject to *reprisal*, are, on a re-capture, to be restored by paying to the re-captor, if a *public* vessel, *one eighth*; if *private*, *one sixth*.

If before the re-capture the vessel had been armed and equipped as a vessel of war, *one half*.

If the owner of the re-captured vessel, captured as above, is under the protection of a government in amity with us, she is to be restored on the same terms, if by the laws of the neutral country our vessels would be entitled to like restoration—if otherwise, the salvage would be regulated by the laws of that country.

Public vessels, re-captured, are to be restored to the United States, and in lieu of salvage the following allowances are to be paid out of the public treasury—

If the re-capture is by a private vessel, and the recaptured is unarmed, *one sixth* of the value; if by a public vessel, *one twelfth*.

If the *re-captor* and *re-captured* are public armed vessels, *one fourth*.

If the *re-captor* is a private vessel and the *re-captured armed*, *one half*.

SECTION VI.—DISSOLUTION OF THE CONTRACT.

The contract for carrying goods in merchants' ships may be dissolved by matter extrinsic. If the act to be done, (lawful at the time,) becomes unlawful before the performance by the act of the government, the agreement is absolutely dissolved. If, for example, war should take place between the State to which the ship or cargo belongs, and that to which it is destined, the contract is at an end.

But it is different in case of an *embargo*—this being only a temporary restraint.

In case, however, of a blockade of the port of *destination* or *discharge* after the contract is made, it is a dissolution of the contract; but it is different in case of a blockade of the port of *departure*.

SECTION VII.—SEAMEN.

The laws of the United States provide that the master of any ship or vessel bound to a foreign port, and of any ship or vessel of fifty tons burden bound from one State to another, except an adjoining State, shall, before he proceeds on the voyage, make a written or printed agreement with the seamen; and if this is not done, he shall be liable for the highest wages given at the place within the six next preceding months, and to a penalty of twenty dollars for every man; and the seaman so employed without the shipping paper, is not subject to the penalties and forfeitures prescribed in the act for regulating seamen.

This provision does not extend to a case of the employment of seamen in a foreign port.

Where in the shipping articles the name of the master is left blank, the seamen are obliged to serve under any master the owner may appoint. These articles are always admissible as evidence of the terms of the hire. They must describe the voyage and time of service ; and any loose, vague, or unusual stipulations against the seamen, are viewed by the courts with jealousy and construed with a special regard to the protection of the seamen.

If the seaman is disabled by injury or sickness happening during the voyage, he is entitled, notwithstanding, to the whole of his wages. So, if the master, in violation of his contract, discharges a seaman from the ship during the voyage, he is entitled to his full wages up to the prosperous termination of the voyage, deducting the wages which he may have earned in the mean time in another vessel.

If the seaman with his own consent is discharged abroad, he is entitled to his wages up to the time of his discharge ; and if the discharge is in a foreign port, he is entitled to three months additional pay, one third of which is to be retained by the consul as a fund for sick and disabled seamen. But if a seaman leaves the ship with consent to serve on board the convoy, he is entitled to his wages only until the arrival of his own ship at the port of discharge.

If the seaman dies during the voyage, his wages are due up to the time of his death.

Where a ship sails to several places, the wages are payable to the time of the delivery of the last cargo.

If after the hiring of seamen the owners of the ship do not think proper to send her on the voyage, the seamen are paid for the time employed and for damages for breach of the contract, according to the circumstances.

Where the cargo is saved and a proportion of the freight is paid by the merchant in respect of it, the seamen, upon the same principle, are entitled to their wages.

In case of shipwreck, the seamen are entitled to their wages,

or an equivalent by way of salvage, in case they do their duty, and sufficient is saved for that purpose from the wreck.

When the voyage is ended and the cargo or ballast discharged at the last port of delivery, the seamen are entitled to their wages; and if not paid in ten days, admiralty process is authorized against the master. It would *seem*, in this case, that the *ten days* might be reckoned from the time the cargo *ought* to have been delivered, or the ballast discharged.

In cases of total loss or capture the seamen lose their wages. Desertion from the ship, is a forfeiture of the wages previously earned. But if the seaman suffers the punishment of imprisonment for desertion, the forfeiture of wages is not to be superadded.

A written memorandum is to be made on the shipping paper as to the time and hour when the seamen shall render themselves on board for the voyage, and their neglect entered on the *log book*; and they forfeit for every hour's absence a day's pay; and if they neglect or desert so that the ship has to sail without them, they forfeit double their advance wages. After the ship's departure, in case of absence and return in forty-eight hours, they forfeit for every day three days' pay. If absent more than forty-eight hours, they forfeit all their wages and property on board or in any store, and are further liable in damages. Seamen forfeit their wages for gross offences, but not for slight faults either of neglect or disobedience. Even in cases of aggravated offences, if the seaman repents and tenders amends, he is entitled, ordinarily, to be reinstated; and if he is received into service, the forfeiture is thereby remitted. In cases of imperfect performance of duty, not visited by forfeiture, courts of admiralty make reasonable deductions from the wages.

Seamen may proceed against the ship for their wages, and *fishermen in the codfishery, &c.*, have the same right.

The agreement with fishermen must also be in writing, specifying the terms of the engagement; they are liable, also, to like penalties for desertion as seamen in the merchant service. Any neglect or refusal to do duty, or resistance to just com-

mands, subjects the offender to damages and a forfeiture of bounty.

The services of fishermen entitled to their respective shares do not constitute a *copartnership*, and it has been determined that these *shares* were in the nature of wages unliquidated at the time.

CHAPTER NINTH.*

INSURANCE.

Insurance is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event.

The party *taking the risk* is called the *insurer* or *underwriter*, the party *protected* the *insured*, the sum paid to the insurer is the *premium*, and the *written instrument*, in which the contract is set forth in due form, the *policy of insurance*.

Marine insurances are made for the protection of persons having an interest in ships or goods on board, from the loss or damage which may happen to them from the perils of the sea, during a certain voyage or fixed period of time.

* Marshal on Insurance. Chitty's Blackstone. Kent's Com. Story's Abbot.

SECTION I.—THE PARTIES.

All persons, whether aliens or natives, except alien enemies, may be insured. If the ship be specified in the policy, it becomes part of the contract. But insurance will be good without naming the ship, as upon goods in any ship or ships, or on account of *A or whom it may concern*, and any one having an interest may maintain an action. Enemies' property is not insurable.

Insurance companies incorporated by the State Legislature may make insurances on vessels, freights, money, goods and effects, and against captivity of persons, on *lives*, and money lent on *bottomry* and *respondentia*, and may fix the premiums and terms of payment.

Policies signed by the President, or in his absence, &c., by two directors, and countersigned by the Secretary, shall bind the company; and losses adjusted by the President and directors shall also bind the company.

The company may loan one half the capital on *bottomry* or *respondentia*, no loan on any one bottom to exceed ten per cent., nor shall the company take on any one insurance more than ten per cent. of the capital stock paid in.

These companies are not to engage in trade or merchandize, and if the President and directors, after known losses to the amount of the capital stock, shall subscribe to any policy, their respective estates shall be jointly and severally bound to respond every loss under any policy so subscribed.

SECTION II.—SUBJECTS OF INSURANCE.

The proper subject of insurance is lawful property, engaged in a lawful trade.

Trade with an enemy is unlawful, and insurance of such is void. So an insurance of a voyage undertaken in violation of a blockade. Any illegality in the commencement of an entire voyage will render the whole illegal, and destroy the policy intended for its protection. But an insurance to a country of a trade forbidden by *its* laws, binds the insurers. So insurance by a neutral of goods contraband of war, is a valid contract.

Seamen's wages are not insurable, as otherwise seamen would want one great stimulus to exertion in times of difficulty and disaster.

Wagering policies, or those in which the insured has no interest, are void.

In the United States, as well as in England, *freight* is insurable, whether *contingent* or *dead* freight. The risk generally begins from the time the goods or part of them are put on board.

Profits are alike insurable, and so of commissions.

An *open* policy is one in which the amount of interest is not fixed by the policy, but is left to be ascertained by the insured in case of loss. A *valued* policy is where a value is set on the ship or goods insured, and inserted in the policy in the nature of liquidated damages.

Unless the valuation is grossly enormous, so as to raise a strong presumption of fraud, it is conclusive between the parties, and this whether the loss is total or partial.

After an insurance, the insurer may have the entire sum reassured to him by some other insurer.

A *double insurance* is where the insurer makes two insurances on the same risk and the same interest. In this case he may sue and recover on both policies, but the law will not allow him a double satisfaction. The policy first in time bears the loss.

SECTION III. — WARRANTY AND REPRESENTATION.

A warranty is *affirmative*, as where the assured undertakes for the truth of some positive allegation, or *promissory* where he undertakes to perform some executory stipulation.

Warranties are express or implied. *Express* where a particular stipulation is introduced into the written contract, as that the property insured is *neutral*; *implied*, which necessarily results from the nature of the contract, as that the ship shall be sea-worthy when she sails. The most usual express warranties are that the ship was safe at such a time, or would sail by such a day, or would sail with convoy, or against illicit or contraband trade, or that the property insured is neutral.

Warranties, whether express or implied, differ in this from representations, that they are conditions *precedent*, and require a strict and literal observance.

A misrepresentation to the underwriter, or concealment of a fact material to the risk, avoids the contract—and this whether from negligence, mistake or design. The question is, in all these cases, whether there was a fair representation or a concealment. If the misrepresentation or concealment was by fraudulent design it avoids the policy, whether material or not; if from mistake or oversight it does not affect the policy, unless it was material. The general rule is, that all facts material to the risk, and known to one party and not to the other, must be fully and fairly disclosed when the policy is to be effected. It is sufficient however that a representation be true in *substance*; and the insured need not disclose what the underwriter *ought* to know, nor what *neither is bound* to know.

SECTION IV.—RISKS OR PERILS WITHIN THE POLICY.

The insurer charges himself with all the maritime perils that the thing insured can meet with on the voyage. The perils enumerated in a common policy are sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from all causes incident to maritime adventure. If an embargo intervenes after the commencement of the voyage, whether by your own or a foreign government, this is a risk within the policy. Interdiction of commerce with the port of destination is not a loss within the policy.

In regard to partial losses arising from perishable goods or from trivial subjects of difference, it is usual to introduce by way of *memorandum* a stipulation that upon certain articles the insurer shall not be answerable for *any* partial loss whatever, and upon others none under a given per cent. These articles are declared in the policy to be free from averages under a given rate, *unless general, or the ship be stranded*.

After much litigation, it has been settled that the underwriter pays nothing if the loss of the memorandum articles be partial and not total; and it is partial only when part of the cargo arrives in safety, however deteriorated in value, though another part of the cargo be wholly destroyed by disasters on the voyage.

The ignorance or inattention of the master or mariners is not one of the perils of the sea. The insurer undertakes only against extraordinary perils, and not those ordinary ones to which every ship must be inevitably exposed. Damages resulting from the ordinary employment of the ship, or the inherent infirmity of the article, do not come within the policy.

The wages and provisions of the crew during the necessary detention for repairs rendered necessary by the perils of the sea, are chargeable upon the insurers. Sails and rigging put on shore during repairs in a foreign port, and destroyed by fire, are covered by the policy.

SECTION V.—THE CONTINUANCE OF THE CONTRACT.

The commencement and end of the risk depend upon the terms of the policy. The risk may be on a voyage *out*, or *out and in*, or for *part* of the route, or for a *limited time*, or from *port to port* in an intermediate stage of the voyage.

If the risk be *from* a place, it does not commence until the ship breaks ground; if *at and from a place*, it commences, provided the ship be at home, from the subscription of the policy.

Where the policy is to a country generally, as *Jamaica*, the risk ends at the first port made for the purpose of unloading, after the vessel shall have been moored *twenty-four hours*. But the risk continues during *quarantine* though after the twenty-four hours.

In regard to *the cargo*, the risk continues while it is actually on board, although, if the goods be temporarily landed from necessity during the voyage, they are still protected by the policy.

Policies are construed according to the usages of trade. If it be the usage for the owner to employ a common lighter to remove the goods from the ship to the shore, the policy covers them; but the case is otherwise if he employs his own lighter or takes the goods upon his own charge.

Where the insurance is on freight, the risk begins from the time the goods are sent on board.

SECTION VI.—DEVIATION.

If the vessel departs voluntarily and not from necessity from the usual course of the voyage, the insurer is discharged. The

voyage must be performed in the regular and customary track. But if the loss occurs *previous* to the deviation, the insurer is not discharged.

The shortness of time or of the distance of deviation makes no difference; if it be voluntary and without necessity, it determines the contract. Stopping or going out of the way to relieve a vessel in distress, especially if to save life, may not be a deviation.

Every unnecessary delay, in or out of port, is a deviation.

If the ship quits her course from necessity, she must pursue her new course in the best way, or it will be a deviation.

SECTION VII.—ABANDONMENT.

If the loss be such that the voyage is not worth pursuing, the insured may abandon to the insurer, and call on him as for a total loss. As where the cargo is so damaged that it is of little or no value, or the salvage is very high, or the damage exceeds one half the goods insured; in these and like cases, the insured may abandon them as a total loss.

The abandonment is retrospective, and transfers the property from *the insured* to *the insurers*.

As soon as the insured is informed of the loss, and has had time to learn its character and extent, he must determine promptly whether he will abandon or not, and if he elects to abandon he must do it in a *reasonable time*, and give notice immediately to the insurer. Unless he does this, he can recover only for a partial loss, unless it be absolutely total.

The right to abandon does not depend upon the *certainty*, but the *high probability* of a total loss of property, voyage, or both. But in case of an entire destruction of the property insured, the abandonment is unnecessary.

Abandonment, rightfully made, is absolute, and cannot be controlled by subsequent events.

There is a difference between insurance on a ship and on the cargo. Loss of the voyage for the season, unless the cargo be of a perishable nature, does not amount to a total loss. There must be an actual total loss, or one in the highest degree probable, to justify an abandonment of the cargo. But if the *ship* or *cargo* be damaged so as to diminish their value above half, they are said to be lost.

SECTION VIII.—ESTIMATION OF LOSSES.

One half the value of the vessel means one half the *market* value at the time of the disaster.

The *one half of the cargo* is to be determined in *open* or *valued* policies by the price the goods would have sold for at the port of destination; this is to be estimated by including the prime cost and expenses of outfit, and freight and expenses at the port of delivery, and the profit or loss arising from the state of the market—and this places the insured in the same situation as if his voyage had been successful.

Another mode of calculating the indemnity is to pay the first cost of the goods and expenses incurred; this places the insured in the situation he was in before he undertook the adventure.

If goods arrive damaged at the place of destination, the *quantum* of damage is ascertained by comparing the market price of the *damaged* with that at which the *sound* goods would have sold. This, however, is no indemnity to the insured, for he has to pay the *freight* for goods, as if sound, which he cannot recover of the insurer. This is, however, cured by particular stipulations in the policy.

An adjustment of a general average at a foreign port is conclusive, as well between the parties to the policy as between the parties in interest in the adventure.

The adjustment of a loss cannot be set aside or opened ex-

cept on the ground of fraud, or mistake of facts unknown. In making the adjustment of a partial loss, the rule is to apply the old materials towards the payment of the new, by deducting the value of them from the gross amount of the expenses for repairs, and to allow the deduction of one third new for old upon the balance.

SECTION IX.—RETURN OF PREMIUM.

If the contract is void from the beginning, the principle is, “no risk, no premium.”

If the insurance be made without interest, and this proceeds from mistake or misinformation, the premium is to be returned.

But the insurer retains the premium in all cases of actual fraud of the insured or his agent. If the voyage be divisible, and the risk as to one part of it has not commenced, the premium may be proportionably returned; but this can be only where the risks are divisible and distinct in the policy.

SECTION X.—BOTTOMRY AND RESPONDENTIA.

Bottomry is a loan on the ship and freight, upon a pledge of them as security for the money loaned.

It covers the whole freight of the voyage from the port of departure to that of destination.

Respondentia is a similar loan on pledge of the cargo; but *ship and cargo* may be thus pledged.

These contracts or obligations are not usurious, as the entire principal and *interest* are, during the voyage, at the hazard of the lender—for if the subject pledged be lost, by the perils of the sea, both the money borrowed and the interest are lost to the lender.

The power of the master to take money on bottomry or respondentia, exists only after the voyage is commenced, and is to be exercised in some foreign port, where the owner does not reside. But a *foreign port* is not indispensable, especially where the port in the *same* country is so remote that the owner could not be seasonably consulted.

If the risk ceases, the marine interest ceases, and the legal interest may commence.

BOOK FOURTH.

REAL PROPERTY.

CHAPTER FIRST.*

SECTION I.—ORIGIN OF TITLE.

THE ACQUISITION OF ONE, WITH THE ACQUIESCENCE OF THE REST, *is the origin of title to real estate*, however the acquiescence may have been obtained. It has been said that occupancy and improvement give no right to exclude others from the possession of lands; yet the same principle which would give the occupier a right to the fruits of the earth acquired by his own labor, would give him the exclusive right to the land which he has fitted for the production of these fruits. When once the occupier shall have acquired a peaceable and exclusive possession of the land, and especially shall have fixed his dwelling there, it may (not merely as a civil right, but) by the universal law of nature be *transferred*, and if not so transferred, *descend*, at his death, to his kindred; and the grantee in the one case and the child or kindred in the other, would have a natural right to exclude all strangers.

* Const. and Laws Mass. and Maine. Chitty's Black. Ed. Enc.—title Law. Paley's Moral and Political Philosophy.

But our rights to real estates derived from the native savages, are questioned on different grounds. Upon the first discovery and settlement of this country, the natives had no definite ideas of individual and exclusive property in lands. The most that was pretended was a right in *the tribe* to what we should call *easements*. These natives were in different stages of the savage state. Some gathered only a scanty subsistence from the spontaneous growth of fruits and vegetables. Others had proceeded a step further, to the hunter's or fisher's state. Others, still, had succeeded in a rude and imperfect agriculture. And though the article of consumption thus acquired was, by a sort of common consent, the property of him by whose labor it was obtained, still, the *place* or *means* of the acquisition was seldom, if ever, a subject of exclusive occupancy.

The hunting grounds or piscaries were common to all the tribe, and the means of selection for agricultural purposes were so ample, that very little clashing for possession would probably occur.

Still, the right of occupancy of some sort was in the tribe to the exclusion of all other tribes, and it would be difficult to perceive how any nation, how much soever *civilized*, could acquire a right of *the Indians themselves* by *original* discovery. By *original discovery* is meant a discovery prior to that of any other *adventurer*. And it is not readily perceived from what school of morality the right is derived to limit the Indian in his sale to the sovereign of the discoverer. Still, such is our right to the soil of this State, and others of the United States, that it depends upon a sale by the natives who were forbidden to sell to any but ourselves; and with some exceptions, the sale must have been to *the sovereign*, and not to an individual; and it is become the settled doctrine that the State, having the right by discovery, whether original or by transfer, has the sole power of acquiring the soil from the natives.

There are, however, extensive tracts of land in Maine, now held by title derived from Indian chiefs to *individual purchasers* without any grant or confirmation on the part of the State—

the court admitting the deeds from such Indians as evidence of *the extent* of the grantee's possession.

SECTION II.—REAL ESTATE—DEFINITION.

Real property is such as is permanent, fixed, and immoveable, which cannot be carried out of its place, as *lands* and *tenements*.

Land comprehends every thing of a permanent, substantial nature. If a man grants *all his woods* or his *pasture*, the land passes.

Tenement is of still greater extent, and signifies every thing that may be *holden*, provided it be of a permanent nature, whether substantial or unsubstantial. Thus a *frank tenement*, or *freehold*, is applicable not only to *lands*, but to *rents*, *common*, &c.

Hereditaments include both the others and more. Whatever may be *inherited*, corporeal or incorporeal, real, personal, or mixed, is a hereditament. Hereditaments are corporeal or incorporeal; the former may be comprehended under the general definition of *land*, and the latter growing out of a thing corporeal, or concerning, annexed to, or exercisable within the same.

CHAPTER SECOND.*

TERRITORIAL LIMITS.

Our boundaries are defined on the west by a late adjustment of the line with New Hampshire, and on the south and south-east we comprehend all islands within twenty leagues of the shore and included within east lines from the mouths of the Piscataqua and St. Croix, excluding Grand Menan and including Moose, Dudley and Frederick Islands in the Bays of Fundy and Passamaquoddy, and excepting all other islands which at the treaty of 1783 belonged to the province of Nova Scotia.

The eastern boundary on the Province of New Brunswick is established from the mouth of the St. Croix (Schoodic) to a monument fixed at its source, and thence *due north* to the northwest angle of Nova Scotia, (now New Brunswick,) which angle is formed by the intersection of this north line with the highlands which divide the rivers that flow into the *Atlantic* from those which flow *into the river St. Lawrence*.

France had claimed, by right of discovery, all the country stretching from the 40th to the 46th degrees of latitude, inclusive, under the name of *Acadia*, and had, so early as 1603, granted it by letters patent. In 1620, King James I. granted to the Plymouth Company all lands between the 40th and 48th degrees of latitude. This Company, in 1627, conveyed to Henry Roswell and others what is now Massachusetts. In 1639 a charter was made to *Sir Ferdinando Gorges*, of the Province of Maine, from the Piscataqua to the Sagadahoc

* Treaty with G. Britain, 1783; Decision of Commissioners under the Treaty of 1794. Memorials of the British and French Commissioners concerning the limits of Nova Scotia—2 vols. 4to. London ed. 1751.

(Kennebec) and one hundred and twenty miles into the country. Gorges' title was purchased out by Massachusetts, in 1677.

As early as 1621, Sir William Alexander obtained from King James a grant of *Nova Scotia*, including all the main land east of the *St. Croix* between the *St. Lawrence* and the Atlantic Ocean.

By the treaty of *St. Germain* of 1632, all the places occupied by Great Britain in New France, Acadia and Canada, were *restored* to France. In Cromwell's time, and about the year 1656, certain posts in the territory had been taken and occupied by the English. But by the treaty of *Breda* of 1667, the country called Acadia was *restored* to France as *heretofore enjoyed*.

By the 12th article of the treaty of *Utrecht* of 11th April, 1713, France cedes to Great Britain, *Nova Scotia or all Acadia comprehended within its ancient limits*. The original treaty is in *Latin*, and the words are:—"NOVAM SCOTIAM quoque, sive ACADIAM TOTAM limitibus suis antiquis comprehensam."* The original words are quoted, from the singular fact that the question upon the translation of this clause involved the two nations in a war which resulted in the capture of *Quebec* and the treaty of 1763, whereby all Canada was acquired to the British Crown. The arguments of the respective commissioners in the correspondence previous to the war of 1756, are curious specimens of acute criticism—the French insisting that *Nova Scotia or all Acadia* should read *Nova Scotia otherwise called Acadia*—and the British that it was intended to embrace two distinct territories, interfering in part, but each extending beyond the limits of the other. The British commissioners in that controversy described their claim as extending from the mouth of the *Penobscot* north to the *St. Lawrence*, including all the main land to the east. The French urged their claim down to the south of the *St. Lawrence*, as

* The translation of the British commissioners is "*all Nova Scotia or Acadia with its ancient boundaries*." The French commissioners translate it thus—"de la Nouvelle Escosse autrement dite Acadie, en son entiere, conformement a' ses ANCIENNES limites,"

part of Canada. By the treaty of 1763, Great Britain obtained both sides of the disputed line, and could have fixed it as best suited her convenience.

Previous to this, by the charter of 1691, she had granted to Massachusetts "the Province of Maine, the territory called Acadia or Nova Scotia, and *all the lands lying between Nova Scotia and Maine.*" This grant carried Maine as far east, at least, as the *St. Croix*, and as far north as Nova Scotia extended.

Some of the French commissions to the Governors of Canada extend the south line *ten leagues* south of the *St. Lawrence*—which very well accords with the designation after both Provinces had become British.

The British King's proclamation of 1763 defines the south line of his newly acquired Province of Quebec as passing along the highlands which divide the rivers which empty themselves into the *St. Lawrence* from those which fall into the sea, and also along the north coast of the *Bay des Chaleurs* to the Gulf of *St. Lawrence*, and then northerly by this Gulf to Cape Rosiers, &c. The act of Parliament of 1774 repeats the definition of this line inversely, thus—"South by a line from the *Bay des Chaleurs* along the highlands which divide the rivers which empty themselves into the river *St. Lawrence* from those which fall into the sea." Nova Scotia, in 1763, was organized as a distinct Province, and this *south* line of Quebec or Lower Canada made the *north* line of the Province of Nova Scotia.

Thus had the negotiators of the treaty of peace of 1783, directly before them the boundaries of Canada and Nova Scotia, perfectly defined, twenty years before, and exactly corresponding—the south line of the one making the north line of the other, and agreeing, with scarce a variation, with the limits of Canada, *ten leagues* south of the *St. Lawrence*, as described in the French Governor's commission.

With these facts before them, the British and American ministers negotiated and made the treaty of 1783. The starting place or *terminus a quo* is the *northwest angle of Nova*

Scotia. It would seem impossible that either party could mistake it. An angle is made by transverse lines intersecting each other, and the point of intersection is the angle. If one of these lines is due north and the intersecting line is west, the angle is a north-west angle, *and a right angle*. Should the west line incline to the south, the angle, according to this inclination, is more or less *obtuse*, and is westerly of north-west. So, on the other hand, if it incline northerly, the angle is more or less *acute*, and is northerly of north-west. A *north-west angle*, therefore, contemplated a *west* line to intersect this *north* line. Now this very line is found to have been, at the time of the treaty of 1783, running along on the north shore of the *Bay des Chaleurs*; and as the north line is established from the source of the St. Croix, the intersection of these two makes the angle, and makes it, moreover, a *north-west* angle.

But as if to exclude all possible ground of mistake or cavil, and to make assurance doubly sure, the treaty goes on to designate it more particularly, and it makes it “that angle which is formed by a line drawn due north from the source of the St. Croix to those highlands which divide the rivers which flow into the St. Lawrence from those which flow into the Atlantic Ocean.” Now unless there are phenomena there which exist nowhere else, the lands from whence the waters flow in opposite directions must be *high*. Water will run *down* and not *up*; and the north line is to stop at the dividing of the waters, and here is this north-west angle. The treaty does not say *mountains*, nor even *hills*, but *highlands*—such as divide the waters. This position being found, the boundary line proceeds along on these highlands until it meets the boundary established with New Hampshire.

CHAPTER THIRD.*

INCORPOREAL HEREDITAMENTS.

SECTION I.—COMMON.

Common is a right that one man has in the lands of another. This right is scarcely known in this State. There may be cases of common of pasture—this may be apportioned on an alienation of the land. Thus if a man is seized of forty acres of land, with a common of pasture appurtenant in two hundred acres adjoining, and sells five acres, the right of common equal to *one eighth* passes with the land.

SECTION II.—FISHERY.

It was a settled principle of the common law, that in rivers and streams not navigable, the riparian proprietors had the exclusive right to the fisheries to the extent of their lands. But in bays, arms of the sea, and navigable rivers, the right of fishing was common to all. And it has been the practice from the first settlement of this country, for the Provincial and State Legislatures to regulate the taking of fish in the streams not navigable; and the principle has been judicially settled that the owners of the lands and the fisheries hold their property subject to such regulations as the Legislature shall from time to time,

* Co. Lit. Chitty's Bl. Angel on Water-courses. Kent's Com. Stat. Maine. Decisions S. J. C. Maine and Mass.

for the preservation of the fish, prescribe. These regulations qualify and explain private right, but the right of property still exists according to the principles of the common law.

The owner of the land covered with water is entitled exclusively to the fishery ; and he may grant it without the land, or he may grant a right in common with himself.

The owner of the land on both sides of the stream owns the fishery so far as the stream extends within his banks. But so soon as the fish have passed on to the territory of his neighbor, his right to take them ceases.

If the stream crosses a highway, it would seem that the right to take the fish there is common to all. But all these rights may be the subject of statute regulation. The riparian proprietors have not, it would seem, a *common*, but a *territorial* right—the fishery of each extending to the *thread* or *middle* of the river, which is to be ascertained by measuring from shore to shore ; though between *nations* the boundary would be the *middle of the deepest channel*.

In the absence of statute provisions, it is quite uncertain how far an exclusive fishery in the riparian proprietors would entitle them to use their rights so as to diminish the rights of others on the stream above and below. Any invention which would effectually take all the fish that should attempt to pass, might be so far injurious to the rights of others as to entitle them to a remedy. To prevent such use, however, of the right as given by the common law, the statutory provisions are interposed.

Riparian proprietors may erect dams across their streams, but statutory provisions always secure a passage for the fish. Those proprietors may take the fish in the stream which divides their lands to the exclusion of others, but not so as to destroy them entirely or prevent their passing on for the benefit of other owners on the stream.

SECTION III.—WAYS.

A *public highway* is one which all have a right to use. It may be co-extensive with the jurisdiction of the State, and when converted by act of Congress into a "post road," and united with one through other States, it may be extended as far as the jurisdiction of the United States extends.

A *town way* is one where the whole road begins and terminates in the town, and is made for the special use of the inhabitants. A *private way* is for the use of particular individuals, one or more. But in regard to town or private ways, a stranger, it is presumed, may lawfully use them, if it is done without impairing or obstructing the use of those for whose special benefit they were granted.

How far the United States, by establishing a public, town, or private way, as a "post road," could convert it to such use and preserve it from obstruction or discontinuance by State authority, is a question yet to be settled.

The land over which the way passes belongs to the owner of the soil, and he has his remedy for any injury done it, not required for the construction and preservation of the road. The laws of the State for laying out and repairing highways, and town and private ways, are too voluminous to be embraced even in substance in a work like this. It must suffice if the general principles are stated.

Formerly, the power to lay out, alter, and discontinue *highways*, was in a Court of Sessions; it is now vested in a board of three commissioners in each county. This tribunal is partly *judicial* and partly *executory*. Their powers extend to the laying out, altering, and discontinuing highways. They, like other courts, hold regular sessions, have a clerk, and keep a record. Upon a petition for any of these purposes in regard to highways, and satisfactory evidence that the petitioners are responsible and the petition is reasonable, they proceed to view

the route ; and on view, with notice and hearing, their determination returned to their session, accepted and recorded, as to the location, alteration, or discontinuance, is final, unless the party aggrieved shall reverse it by a jury, to be summoned as the law provides.

The jurisdiction of the commissioners is limited of course to the county. But the boards of commissioners of two or more counties may act together, and by a majority of each board determine as to the road, if it extends into or through two or more counties. For injuries in cases of public, town, or private ways, the party aggrieved may have a trial by jury, and the process and trial are prescribed, and the effect of the verdict and judgment.

The several towns are obliged by law to make the new roads thus laid out, and to keep the old ones in suitable repair at their own expense. The *surveyors* to be appointed by the towns are the executive officers, who by their warrant with the tax list from the assessors are to expend the money raised by the legal voters of the town ; they are, in their respective districts in the town, to make and repair the roads and remove the snow and other obstructions. These taxes may be paid in labor on the ways or in money, and the surveyors are to make return to the assessors of all defaults of payment, which are to be inserted in the next town tax of each delinquent. The surveyor may remove all trees and other obstructions, and take the materials in his location for purposes of construction and repairs, taking care not to injure adjacent proprietors. In case of deficiency of any highway, the town, as a corporation, is liable to indictment ; and on conviction, default, or confession, may be assessed in a fine sufficient to repair the deficiency, and the court may appoint an agent, who, with the warrant of distress against the town, shall collect and expend the money on the deficient way.

The selectmen, by themselves, or their appointment, may lay out a town or private way, and if recorded and presented to the town at a meeting for the purpose, and approved and allowed, it shall be a way for the use of the inhabitants of the town or individuals, as the case may be ; and by similar process it may be altered or discontinued.

If the selectmen refuse to lay out, alter, or discontinue a town or private way, or the town to accept their doings, the commissioners, upon application of the party aggrieved, may cause the same to be done.

The law as to the rights of owners adjacent is the same as that in regard to riparian proprietors—each extends to the centre of the road.

Damages allowed for highways are paid by *the county*, those for town ways by *the town*, and those for *private ways* by the individuals for whose use they were laid out. And controversies in regard to damages are finally adjusted by the intervention of a jury.

The right of passing over the land of another may be by grant or prescription. An uninterrupted enjoyment for twenty years is presumptive of a grant. It imports, however, a right of passing in a particular line, and not of varying at pleasure. If it be a right in gross, it dies with the person; but when it is *appurtenant*, or annexed to the estate, it descends with it, or passes by assignment.

If one sells land surrounded by his own, the purchaser has a way to it as incident from necessity.

This right of *necessity* exists even over land which the claimant of the way had previously sold; and where the close subject to the way and that to which the way is necessary is united in the same person and afterwards disunited, this right of way is revived; but the case would be different if it were a way of mere easement or convenience.

SECTION IV.—FRANCHISES.

Franchises are privileges granted by government to *individuals*, or in most cases to *corporations*. Yet there seems to be some impropriety in considering a franchise in a *corporation* as a *hereditament*, inasmuch as no corporation can *inherit*. Yet

these grants to corporations are considered as franchises, and so obnoxious are they as “exclusive privileges,” as they are called, that they are often refused, when the corporation would pay a fair equivalent, and the public would *gain* instead of suffering by the grant. Some seem to believe that in a grant of a franchise the public *must* lose just so much as the company gains—as though there could be no compact or agreement that could be profitable to both parties. Questions are often raised on Legislative encroachments upon these privileges, by establishing rival institutions against express stipulations, or modifying the grants where there are no reservations of the power to do it in the charter.

SECTION V.—ANNUITIES.

These are yearly sums stipulated to be paid to another in fee, or for life, or for years, and chargeable only upon the person of the grantor. Unless the grantor grants the annuity for himself and his heirs, *these* are not personally bound.

SECTION VI.—RENT.

Rent is a certain profit in money, provisions, chattels or labor, issuing out of lands and tenements, in retribution for the use. It cannot issue out of a mere privilege or easement. Distress was the universal remedy for non-payment of rent, but our attachment laws have nearly if not entirely superseded it. If the tenant be evicted from the land by a paramount title before the rent falls due, the obligation to pay it ceases. But if the eviction be of *part* only, the rent is apportionable and the eviction a bar only as to so much.

But upon an *express* contract to pay rent, the loss of the premises by fire, or inundation, or external violence, will not exempt the tenant from the obligation of rent.

Without special contract or usage to the contrary, the rent is due at the end of the year.

On a division of the reversion by sale, devise or descent, the rent is to be apportioned according to the different interests of the reversioners.

CHAPTER FOURTH.*

FREEHOLD ESTATES OF INHERITANCE.

Allodium signifies an estate entirely free, and not held of any superior. Our freehold estates of inheritance are in effect allodial. Still it was settled in Massachusetts soon after the revolution, that as all lands were, before that event, held mediately or immediately of the crown, so they were afterwards held mediately or immediately from the State. A *tenure in fee, rent free* and an *allodium*, to all practical purposes, would seem, however, to mean one and the same thing, and the distinction is unimportant.

SECTION I.—FEE SIMPLE.

Tenant in fee simple or *tenant in fee* is he who has lands, tenements or hereditaments to hold to him and his heirs forever, without mentioning *what* heirs, but referring that to his own pleasure or the disposition of the law.

* Chitty's Bl. Kent's Com. Co. Lit. Jackson on Real Actions. Cruise, Kearne, &c. Stat. Maine.

This tenant is said to be seized in his *demesne as of fee*, which means simply that he has *the possession and the title*.

The word *heirs* is necessary in the *grant* or *donation* in order to make a fee or inheritance. But in a *will* other expressions will be deemed equivalent, if they manifest the intention of the testator to give an estate of inheritance.

In grants to corporations sole or aggregate, the word "*successors*" is equivalent to the word "*heirs*" in the case of an individual grantee.

SECTION II.—FEE TAIL.

This was also called a *conditional fee*, as it was a gift upon condition that it should revert to the donor if the donee had no heirs of his body.

A fee tail, however, is not considered as a conditional estate, but such as is *limited* at the will of the donor, and is that inheritance of which a man is seized to him and the heirs of his body begotten or to be begotten. He who gives the land is called the *donor*, and he to whom the gift is made the *donee*.

These estates are in *tail general* or *special*. The former is where lands and tenements are given to one and the heirs of his body begotten. In this case the estate goes to the heirs by *any* marriage. But in *tail special* the gift is limited to some particular heir, male or female.

Both these entailments may be to the heirs *male* or heirs *female*.

Notwithstanding our statutes of descent and distribution, the word *heir* in an entailment is limited to *the eldest*, whether it be in *tail male* or *female*.

Tenant in tail after the possibility of issue extinct is where an estate is given to one and to the heirs of his body on his wife Mary to be begotten, and the wife dies without issue. Here the possibility of such issue as can inherit is extinct; and the

tenant can hold the estate during his life, with many privileges of tenant in tail. He is, for instance, not punishable for waste, nor does his alienation work a forfeiture.

This fettering of estates is not favored, and though the tenant may bar the entailment by a *common recovery*, which is a fictitious action at law whereby the tenant suffers judgment against him and the recoverer obtains an estate in fee simple, yet the statutes have provided an easier and simpler mode. It is provided that any person seized of lands &c. in *fee tail*, being of full age, may by deed executed before two or more credible subscribing witnesses, and acknowledged before a Judge or justice of the peace and recorded in the registry of deeds of the county where the lands are, for a good or valuable consideration, *bona fide* sell and convey such estate in fee simple.

And in all cases where an estate tail in remainder and all the remainders and reversions expectant thereon might be barred by common recovery, by tenant of the freehold and remainder man joining, the same may be barred by them jointly by such deed so executed, and all uses reserved in the deed are as effectual as though they had been declared in the deed made for the purpose of the common recovery.

Whether *tenant in tail after the possibility of issue extinct* can bar the entailment and convey a fee simple demands a doubt. It seems he has but an estate for life, with many of the incidents of an entailment, and the statute makes no discrimination.

All estates in fee tail, *general* or *special*, are liable for the debts of the tenant in tail.

CHAPTER FIFTH.*

FREEHOLD ESTATES NOT OF INHERITANCE.

SECTION I. — ESTATES FOR LIFE.

Every estate for life, as well as a fee simple, is a *freehold*. A conveyance of land without specifying the term of its duration is an estate for life. It may be for one's own life or that of another, and in either case it is a *freehold*.

These estates may be made upon a *contingency*, as to a woman during her widowhood. If the contingency happen which determines the estate during the life of the *tenant*, the estate goes to him in remainder or reversion. If the tenant *for the life of another* dies before the termination of the estate, it goes to the heir.

SECTION II. — TENANCY BY THE COURTESY.

When a man marries a woman *seized at any time during the coverture* of an estate of inheritance in severalty, in coparcenary or common, and has issue born alive which might by possibility inherit as heir to the wife, and the wife dies, (living the husband,) he holds the land during his life, as tenant by the courtesy, and it is immaterial whether the issue were living at the *time of the seizin* or at the *death of the wife*.

The essentials to this estate are *marriage, actual seizin of the wife, issue and her death*, and with these, the law, at her death, vests the estate in the husband without entry.

* Stat. Maine. Co. Lit. Chitty's Bl.

The seizin must be a seizin in deed and fact, and not a mere seizin in law. Still the possession of lessee for years is the possession of the wife as reversioner; but if there be an outstanding estate for life which is not terminated at her death, the husband cannot have his courtesy; but if the estate of inheritance of the wife be vacant lands, not held adversely, she is deemed to be so seized in fact that her husband is entitled to his right of courtesy.

This tenancy by the courtesy is a servile copy of a principle of English law, where no reason whatever for it can possibly exist. That the husband, where the wife dies leaving children by him, should be entitled to a portion of her estate, and *perhaps* for his life, may be well enough; and that in case of no such children, he might be very properly entitled to an interest, though perhaps to a less amount. But that a child's drawing a single breath and instantly expiring, should entitle the father to a life estate in the whole inheritance, and in case of a *still birth* he should have nothing at all, is a principle so preposterous that it borders somewhat upon the ridiculous.

SECTION III.—DOWER.

Where a man dies leaving a wife, she is entitled to one third of all the real estate during her life of which he was seized during the coverture, as her dower. She may, however, relinquish her claim to it, by joining her husband in a deed of conveyance. This is usually done by inserting a clause at the close of the deed to this effect—“*and the said B, wife of the said A, hereby relinquishing her right of dower in the premises, has hereunto set her hand and seal,*” &c.; or it may be done by a separate deed of release.

She may claim her dower of the heir or tenant of the freehold. There must be a demand one month before the suit. To entitle the widow to her dower she must prove—1st, the

demand; 2d, marriage; 3d, seizin of the husband during the coverture; 4th, his death.

The demand may be by *parole*.

Dower attaches upon all marriages not absolutely void, and existing at the husband's death.

The husband must have been actually seized in fee, "either in possession, reversion, or remainder."

When the husband dies *seized*, the widow is entitled to receive from the heirs one third of the profits until her dower shall be assigned; and in all cases where no division of the realty can be conveniently made by metes and bounds, the assignment shall be of *one third of the rents and profits*.

Her *right* to assignment of dower cannot be taken in execution for her debt.

Wife of mortgagor is dowable of an equity of redemption against all but mortgagee; and against him her remedy is by a bill in equity.

She is not dowable of wild and uncultivated lands, nor of such lands cultivated after the alienation of the husband.

Dower is to be proportioned against the alienance of the husband, to the value of the lands as they existed at the time of the alienation, but against the heir, with the improvements made by him after the descent.

A seizin for an instant, as taking a conveyance and giving back a mortgage, does not entitle to dower against rights vested under the mortgage.

If the husband was seized as tenant in common, the commissioners appointed by the Judge of Probate to assign the dower must first sever the tenancy, giving notice, and this partition shall be conclusive upon all interested.

The acceptance of a provision in the will of the husband is a bar of dower.

In case of an exchange of estates, the wife is not entitled to dower in both, but is put to her election.

The assignment may be by *parole*. In dower of incorporeal hereditaments, the one third of the rents and profits are assigned.

Tenants in dower, as other tenants for life, forfeit *the tenancy* by waste.

But if tenant for life aliens in fee, the alienation would be good, perhaps, to the extent of his title.

As regards dower in the several cases of *divorce*, see Book II, Ch. IX, Sec. I.

CHAPTER SIXTH.*

ESTATES LESS THAN FREEHOLD.

By the statute of frauds, "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, or out of any lands, &c., made or created by livery of seizin only, or by parole, and not put in writing and signed by the parties so making and creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of *leases or estates at will* only," and no such leases shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party or his lawful agent, authorized in writing, or by act and operation of law.

SECTION I.—ESTATES FOR YEARS.

A lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. It is a chattel interest, however long the period.

* Co. Lit. Chitty's Bl. Stat. Maine.

When the legal ownership of the *inheritance* and the *term* meet in the same person, the lease-hold estate ceases to exist, or is *merged*.

The lessee may assign or grant over his whole interest, unless restrained by covenant.

No one can lease beyond the period of his own estate. Tenant for life, for instance, cannot make a lease to continue after his death. Tenant for years is not entitled to emblements, provided the lease be for a certain period and does not depend upon a contingency.

SECTION II.—ESTATES AT WILL.

Estates at will are such as one holds at the *will of the lessor*. When this is the case, it is also at the will of *both parties*, and neither is permitted to exercise the power to determine the estate in a wanton manner and contrary to equity and good faith. The tenant, unless he determines the estate by his own act, is entitled to the crop sowed or planted, to reasonable estovers, and a reasonable time to remove his family and property.

SECTION III.—ESTATES AT SUFFERANCE.

Tenant at sufferance is one who comes into possession of land by lawful title, but *holds over* by wrong. He has but a naked possession, stands in no privity to his landlord, and has no right which he can transmit or convey.

The tenant may be removed by ejectment or by process of *forcible entry and detainer*.

CHAPTER SEVENTH.*

CONTINGENT ESTATES.

SECTION I.—ESTATES ON CONDITION.

A condition, *in law*, is, that the tenant shall do no act to the prejudice of the reversion, and it is understood that not only the reversioner and his heirs, but their assignees may take advantage of the breach of such condition.

A condition, *in deed*, is an express contract between grantor and grantee; as, that unless the stipulated rent be paid or a stipulated sum, by a certain time, the grantor or his heirs may enter and take advantage of the breach.

A *precedent* condition is one that must take place before the estate can vest; as, a lease to take effect by a given day, *provided* the lessee pay, &c. *within that time*.

A condition *subsequent* is one which operates upon an estate already vested, and renders it liable to be defeated. So long as the condition annexed to such an estate remains unbroken, the estate remains in the grantee.

Words of *limitation* mark the period which is to determine the estate. Words of *condition* render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation. In the latter case, the estate determines when the period of limitation arrives, without entry or claim. Conditions repugnant to the estate are void.

* Chitty's Bl. Powell's Devises. Kent's Com. Story's Equity. Stat. Maine.

Mortgages are pledges of real estate for the payment of money, and *conditioned* to be void on such payment—as soon as the failure of payment is complete, the *conditional* estate becomes *absolute*.

As soon as the estate is created the mortgagee may enter and dispossess the mortgagor, but is liable to be dispossessed on the performance of the condition.

The condition upon which the land is conveyed, is usually inserted in the deed of conveyance, but the defeasance may be contained in a separate instrument; but by a statutory provision no instrument of defeasance shall avail, as such, in the hands of any one but the original party, unless it be recorded in the same registry of deeds with the deed of which it is a defeasance.

A deed absolute upon the face of it, will be valid as a mortgage as between the parties, if the intention was a security for a debt—and this may be proved by *parole* testimony.

Any property which may be *sold*, may also be mortgaged.

The mortgage is usually accompanied by a bond or note for the sum loaned, and mention of it is made in the *proviso* in the deed. In case of a suit on the mortgage, such bond or note must be produced, in order to obtain judgment.

The mortgagor, or his heirs or assigns, may be reversed of the title at any time within three years after an entry for foreclosure, by paying the money due, interest, costs, and improvements, deducting the rents and profits which may have been received by the mortgagee, his heirs or assigns.

The entry for foreclosure must be either by judgment of law, consent by the mortgagor in writing or by those claiming under him, or by peaceable possession, in the presence of two witnesses. There must be continued possession for the three years or actual notice to the mortgagor, &c. to effect a foreclosure.

Upon tender of the amount due, the mortgagee, or person claiming under him, is obliged to restore possession and execute a deed of release and quitclaim, or cause satisfaction to be entered in the margin of the record in the registry of the deed,

and if he neglect or refuse, the mortgagor or any person having his right may have his bill in equity, and the court may render judgment according to equity and issue execution accordingly.

After possession by mortgagee or any claiming from him and within three years, mortgagor or other person having the right to redeem may have a bill in equity, *without proof of payment or legal tender* in which he shall offer to perform the condition, in cases where the mortgagee &c. has upon request failed to exhibit his claim; and where he has thus failed to exhibit, or otherwise prevented a performance of the condition of the mortgage, the mortgagee &c. is to be charged in costs.

The mortgagor &c. may also have his bill in equity before entry upon him, upon tender of the sums due and request of release or discharge on record; or he may have his bill in equity before entry and without tender, and the court may decree as equity may require—giving time, however, if defendant be out of the State.

The right that the mortgagor has to redeem is called his *equity of redemption*, and this may be attached and taken in execution as other property for payment of debts—subject to redemption, however, in one year after sale.

By a late statute it is provided that instead of the mode otherwise prescribed, the mortgagee or his assigns may notify in a public newspaper printed in the county, his intention to foreclose the mortgage, three weeks successively, or cause an attested copy of the notice to be served upon the mortgagor or his assigns, by a sheriff, deputy, or constable of the town; and this notice, given either way, shall have the same effect as an entry for foreclosure.

SECTION II.—ESTATES IN REMAINDER.

Estates in expectancy are in *remainder* or *reversion*.

The first is a remnant of an estate in land *depending on a particular prior estate created at the same time and by the same*

instrument, and limited to arise immediately on the determination of that estate, and not an abridgement of it. If the whole fee be granted there can, of course, be no remainder. There can be no remainder after an estate in fee simple.

Contingent remainders are where the estate in remainder is limited to take effect either to a dubious or uncertain *person*, or upon a dubious and uncertain *event*. It is so limited as to depend on an event or condition which may never happen or be performed, or which may not happen nor be performed till after the determination of the preceding estate. As, if A be tenant for life with remainder to B's eldest son (then unborn) in tail, this is a contingent remainder. But the moment the son is born it is no longer contingent. But if A had died before the contingency, the remainder would have been absolutely gone. This species of remainder, however, must be limited to some one who may by common possibility, be in being at the time the particular estate determines.

A vested remainder is a fixed interest to take effect in possession after a particular estate is spent. Though it may be uncertain whether a remainder will take effect in *possession*, it still is a vested remainder if the interest be fixed. It is the *present capacity* to take, if the preceding estate should become vacant, which gives it the character of a vested remainder.

When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, "*heirs*" is a word of *limitation* of the estate, and not of *purchase*.

SECTION III.—EXECUTORY DEVISES.

An executory devise is a limitation *by will* of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyance at law.

Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise.

One kind of executory devise is where the deviser parts with his whole estate, but qualifies the disposition of it upon a contingency, and limits that contingency. As, if there be a devise to A for life, remainder to B in fee, provided, if C should within three months after the death of A pay one thousand dollars to B, then to C in fee—this is an executory devise to C, and if he dies in the lifetime of A, his heirs may perform the condition.

Another kind is, where the testator gives a future interest to arise upon a contingency, but does not part with the fee in the mean time. As, a devise to the daughter of B, who shall marry C within fifteen years.

An executory devise differs from a remainder—1st, It needs no particular estate to support it. 2d, A fee may be limited after a fee. 3d, A term for years may be limited over after a life estate created in the same.

The rule is (and we do not know that it has been altered in this State,) that an executory devise is good, if limited to vest in a life or lives in being and twenty-one years.

SECTION IV.—USES AND TRUSTS.

After all the abstruse learning and barbarous dialect in regard to uses and trusts, the subject seems to be *simplified* down to this, that it is *an estate in one for the benefit of another*.

Though the legal estate is in the trustee, the person for whose use the trusts were created is entitled to all the benefits of ownership, and may dispose of and devise them exactly as if they were legal estates, and a court of equity may compel the trustee to execute the trust.

Where a conveyance is absolute and unqualified on the face of it, any declaration in writing, however informal, made by the

grantee, at any time after the conveyance, is competent proof that the estate was held in trust according to the terms of the declaration.

Even where the grantee after the conveyance executed a covenant with certain *creditors* of the grantor to dispose of a part of the estate and appropriate it to the payment of the debts, this has been held to be a sufficient declaration of the grantee that he held the estate in trust.

If a conveyance be made to *the use* of a person, the use is immediately executed, and the legal estate as well as the use is in the person benefited.

But if the conveyance be made *in trust*, the legal estate is in the trustee, and the equitable estate in the person benefited.

Where a grant is made to the use of the *ministry*, no minister being then in existence, the seizin remains in the grantors until there shall be a minister, and they are seized to his use; and in case of a disseizin by a stranger, the grantors may recover the estate for the use intended, in a writ of entry upon their own seizin.

SECTION V.—REVERSIONS.

This is the return of the land to the grantor and his heirs, after the grant is over, or the estate granted is spent. It is an estate in expectancy and arises by operation of law.

Reversions expectant on estates for years, are *immediate* assets in the hands of the heirs—and those expectant on estates for life are transferable or subject to debts, and may be taken and sold during the life of the tenant, subject, however, to the life estate.

But reversions expectant on estates tail, are not assets during the continuance of the entailment.

The reversioner has a vested interest in the reversion, and is entitled to his action for an injury done to the inheritance.

SECTION VI.—ESTATES JOINT AND IN COMMON.

1. *Joint tenancy* is where the survivor of two or more takes the whole. They hold uniformly by *purchase*, and the tenancy is created by one and the same will or deed. The beneficial acts of one results to the benefit of all, and each has the entire possession as well of every parcel as of the whole.

A joint tenant may convey his interest, but cannot devise, for the devise does not take effect until *after* his death, and survivorship results *at* his death.

It is provided by statute that all gifts, grants, feoffments, devises, and other conveyances of any lands &c. which have been or shall be made to two or more persons, whether for years, for life, in fee or in tail, shall be taken, deemed, and adjudged to be estates in common and not in joint tenancy, unless it has been or shall be therein said that the grantees, feoffees, or devisees shall have or hold the same jointly or as joint tenants or in joint tenancy, or to them and the survivor or survivors of them, or unless other words be therein used clearly and manifestly showing it to be the intention of the parties to such conveyances that the lands &c. should vest and be held as joint estates and not as estates in common, with a proviso that it is not to affect joint tenancies where the estate is already vested in the survivor. But a mortgage to two to secure a joint debt is considered as a joint tenancy. So a conveyance to husband and wife in fee, is, notwithstanding the statute, a joint tenancy, but without the rights of alienation or partition by one without the consent of the other.

2. *Tenants in common* are such as hold by several and distinct titles but by unity of possession. If there be a unity of *possession*, though an entire disunion of interest, of title, and of time, it is a tenancy in common. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail or for life; the one may hold by descent,

the other by purchase ; the estate of one may have been vested fifty years, the other but yesterday :

By the statutes of Maine, tenants in common, joint tenants, and coparceners may be compelled by writ of partition at common law to divide their respective tenancies ; but as in this process notice must be served upon all interested, and as this was impracticable in estates held by large companies, and often distributed further among heirs, devisees, purchasers, and judgment creditors, it is provided that any person interested in either of these tenancies may by process of *petition for partition* have his share or proportion set off and assigned to him in severalty. To this end he must apply to the court, setting forth in his petition his title and proportion, and that he holds the estate in common with others unknown, or with A, B, and C, and others unknown ; whereupon the court will order notice *personal* to the persons named, and *general* to all persons unknown who may be interested, to appear and shew cause, if any, why partition should not be made. This last notice is published in newspapers of sufficiently extended circulation, and if no one appears at the return term, which must be in the county where the lands lie, the court will render the interlocutory judgment *that partition be made* as prayed for, and thereupon appoint five or three disinterested freeholders of the county to make the partition. This committee must give notice and make return of the division at the term of the court next after they shall have performed the service, and the judgment of the court thereon with record thereof on the records of the court and registry of deeds of the county, concludes all who have notice as to the right of possession.

The petition may be contested, however, by any one who claims to be sole seized or denies the right or proportion of the petitioner, in which case the proceeding is as in other real actions. If in the trial the petitioner recovers a less proportion than he claims, he must pay the respondent his costs.

Before the committee proceed, the Court shall appoint guardians or attorneys to all interested who are incapacitated or absent.

Although the general notice prescribed by the statute may have been given, and this is presumptive evidence that it has been received, yet it is *only* presumptive; and a party interested who had no notice in fact, may come in after the interlocutory judgment and the return of the committee, and be admitted to contest the partition. And even after final judgment and within three years, any partner or tenant who was absent from the State at the time, and had no notice of the partition, may, if injustice was done him, have partition anew and will be compensated from the shares of those who had the benefit of the inequality.

Twenty years exclusive possession of one tenant in common, is presumed an *ouster* of his co-tenants and a bar to this process, unless the presumption is rebutted by other proofs.

Partition between *heirs* and *devisees* is within the jurisdiction of the "*Courts of Probate*," to which title the reader is referred.

CHAPTER EIGHTH.*

TITLE TO THINGS REAL.

This is, 1st, by occupancy ; 2d, by act of law ; 3d, by act of parties.

SECTION I.—OCCUPANCY.

This may happen where one forcibly or by surprise turns another out of possession, or where the possession being really or apparently vacant a stranger to the title enters and occupies without right. This is termed a *disseizin*. This possession is good against all but the rightful proprietor ; and though it may be defeated by him by dispossessing the *disseizor*, still, if he neglects it, the actual possession may ripen into an indefeasible right.

By our statutes of limitations of real actions no one can claim title to lands if his ancestor has not been seized or possessed within thirty years. Nor can he claim on the *possession* of his ancestor, unless such ancestor was *possessed* within twenty-five years ; nor for a *disseizin* done *to himself*, unless he was seized and possessed within twenty years.

Nor can any one *make entry* into lands, unless by judgment of law, nor maintain any writs of *formedon*, in *descender*, *remainder*, or *reverter*, except within twenty years—provided

* Stat. Maine. Const. Maine and U. S. Chitty's Bl. Jacob's L. Dic. Powell's Devises.

that when the right or title first descended, accrued, or fell, the person be an *infant, feme covert, non compos, imprisoned or beyond sea, or without the limits of the United States*, ten years are to be added to the twenty years.

If at the time of making such entry, any person, by himself or those under whom he claims, shall have entered and possessed adversely *for six years*, he shall be entitled to his improvements by an action prescribed by the statute.

And to this end the defendant in any real action, who by himself or others has held adverse possession *for six years*, may require the jury to ascertain the value of the improvements, and the plaintiff or demandant may require them to ascertain the value of the land without the improvements—and if the verdict be against the defendant on the title, the demandant must elect at the same term to abandon the land or pay for the improvements at the value assessed by the jury; if he abandons, the payments are to be made one third and interests and costs in one year, and each of the other thirds and interest in each of the succeeding years, and the demandant has his lien upon the land for his payments; and in case of such payments being made, the demandant's title is transferred to the tenant. But if the demandant elects to pay for the improvements, he must do it in a year, and until this is done he is not entitled to his writ of seizin.

If tenant by abandonment be evicted by a paramount title, he may recover back his purchase money; but if he makes strip or waste during the periods prescribed for the payments, he is liable as if possession had been taken by the demandant under the judgment.

It is moreover provided that pending the suit, the tenant may *offer* a sum as the value of the lands and another as the value of the improvements, and if the demandant accepts the offer the proceedings shall be the same as if the jury had so found; but if the demandant refuses to agree, and the jury find no more favorable result for him, he shall be liable for costs.

SECTION II. — TITLE BY ACT OF LAW.

I. *Descent.* The right of primogeniture is long since abolished, and the estate descends to the heirs, male and female, whether of the whole or half blood, according to the rules of the civil law.

1. The estate descends to the children and the lawful issue of such children by right of representation.

2. The father.

3. The mother and brothers and sisters, and children of deceased brothers and sisters, by right of representation.

4. Mother.

5. Next of kin in equal degree, collaterals claiming through the nearest ancestor, in preference to those claiming through a common ancestor more remote.

When a child dies under age, not having been married, his inheritance by father or mother goes to the children of such father or mother respectively, and to the issue of deceased children by right of representation.

When all the next of kin are in equal degree they shall share equally, otherwise by right of representation.

Posthumous children inherit like others.

The rule of computation is first to descend till all in that line is exhausted, and then *ascend* to a common ancestor, and thence *descend* to the next heir, reckoning a degree as well in the ascending as descending line.

Illegitimate children cannot take by descent, nor can they transmit by descent, except to their offspring.

By a late act of the State, however, it is provided that when a man has by due course of law been adjudged the father of an illegitimate child, or has acknowledged himself such in writing, the child is *legitimated*; and in all cases an illegitimate shall be heir to his mother, but shall not inherit any estate of *the kindred* of either father or mother. If this illegitimate dies with-

out issue, his estate shall go to his mother—and in case of her decease, to her heirs.

II. *Escheat*. The statute of descents provides that in case of no kindred the estate escheats to the State, saving to the widow her *dower* and the husband his *courtesy*.

Since the statutes of distribution have so multiplied the chances of heirship, and illegitimate as well as legitimate children have acquired inheritable blood, few cases of default of heirs probably will ever occur.

III. *Forfeitures*. Titles to real estate acquired by forfeiture are few. In case of *outlawry* upon the absconding of a person charged by indictment of some criminal offence there is prescribed the forfeiture of the *issues* and *profits* of all his real estate during his life, unless the outlawry be previously reversed.

In case of *misprision of treason* there is a similar forfeiture of the *profits of his lands* during life, as well as of the goods and chattels. There is no case where by the laws of the State the punishment of crime extends to a forfeiture of *the fee*. The Constitution of the State provides that no attainder shall work corruption of blood or forfeiture of estate; and by the Constitution of the United States no attainder of *treason* shall work corruption of blood or forfeiture of estate, except during the life of the person attainted.

IV. *Execution*. Our laws authorize attachments of *real estate* in civil actions, and the estate is holden thirty days after judgment to respond the debt or damages and costs. The execution may issue twenty-four hours after judgment, and may be extended on the lands so attached; and if so extended within thirty days, the title thus acquired by the creditor has relation back to the time of the attachment. Where there is no attachment on the mesne process, or where the judgment creditor abandons it, he may within a year from the judgment levy on other real estate of the debtor or defendant. The judgment creditor has his election to take *personal* or *real estate*; and if the latter, it is to be valued and assigned by three disinterested freeholders of the county, one to be selected by the creditor, one by the officer, and the other by the debtor,

or, if he refuses or neglects, by the officer in his behalf. These are to appraise and assign on oath sufficient to satisfy the debt and charges, and a full return of their doings and of the officer is to be made to the clerk's office and recorded in the registry of deeds within three months. The debtor or defendant is entitled to a year to redeem the levy, and if it is not done within that time such title as the debtor had becomes absolute in the judgment creditor.

In case the real estate is held in joint tenancy, coparcenary, or common, the debtor's portion is subject to levy in the same manner as if he were sole seized. And in case real estate cannot be divided, the extent is to be made upon the rents and profits; and where such estate is held by a tenant of the debtor upon rent, the officer is to cause him to *attorn* to the creditor, and on his refusal, to expel him. Similar proceedings are to be had where the real estate consists of mills or factories or their privileges, owned by several proprietors.

V. *Taxes.* The *unimproved* lands of *non-resident* proprietors, and the *improved* lands of proprietors living out of the State, may be sold for taxes by warrant of distress from the assessors to the constable or collector.

These taxes, whether State, county, or town, are assessed by the assessors of each town; and in default of payment, these lands, upon proper notice, are sold, and a deed given by the officer conveys the title, if the proceedings shall have been according to the provisions of the law. The assessors are allowed a latitude of five per cent. above the sum *raised*, and if they exceed that, their assessment is void and no title passes by the collector's deed.

In case of a sale for several distinct taxes, and one of them is illegal, the whole sale is void.

Lands sold for taxes may be redeemed by paying at any time within two years the tax and expenses and interest at twenty-five per cent. Purchasers making strip or waste within the time of redemption are liable for damages as if no purchase had been made. Where the taxes are assessed upon non-resident proprietors holding in common, any proprietor, upon

furnishing the treasurer of the State, county, or town, according to the character of the tax, with the proportion of his interest in the common property, may pay his part of the tax and discharge thereby his interest from further liability.

SECTION III. — TITLE BY ACTS OF PARTIES.

I. *Deed*. This is a writing under seal, conveying real estate. It must be made between parties able and willing to contract; upon a *good* consideration, as love and affection, or a *valuable* consideration, as for money or other equivalent in value. The former are considered as mere voluntary conveyances, and often set aside in favor of creditors and *bona fide* purchasers. A deed must be *written* or *printed*, and the matter must be set forth *legally* and *orderly*; but, though this is most prudent and proper, still it is not indispensable, as any form which clearly expresses the intentions of the parties would be effectual. *Delivery* is also essential to perfect a conveyance by deed; and to bind others besides parties and privies, it must be recorded in the registry of the county where the lands lie, and in cases where two or more registries are established in the same county the record must be in the registry of the district which includes the lands conveyed.

The statutes of conveyancing provide that all deeds or other conveyances of any lands &c. lying within this State, signed and sealed by the party *granting* the same, having good and lawful right or authority thereunto, and acknowledged by the *grantor* or *grantors* before some justice of the peace or magistrate in the State or any other place where the grantor resides, and recorded in the county or registering district where the lands are, shall be good and effectual to pass the title without any other act or ceremony whatever.

It seems that the word *grant* would, under our statutes, convey real estate. *Bargain* and *sale* would be equally effectual,

and *convey* would probably embrace and be equivalent to all the rest. The words in ordinary use are—*give, grant, sell, and convey*. The *habendum* is in these words, or the like:—To have and to hold the same premises to the said A B, his heirs and assigns, forever. The usual covenants are that the grantor is lawfully seized of the premises, that they are free of all incumbrances, that he has good right to sell and convey them, and that he will warrant and defend the premises against the lawful claims and demands of all persons.

In deeds of *release* or *quitclaim*, the words in ordinary use are—*remise, release, and forever quitclaim*; and the *habendum* is in these or such like words—“To have and to hold the afore-granted premises, with all the privileges and appurtenances thereunto belonging, to him, his heirs, and assigns;—so that neither the grantor, his heirs, nor any persons claiming under him or them or in the name, right, or stead of him or them, &c., shall or will, by any way or means, have, claim, or demand any right or title to the premises &c. or any part or parcel thereof;” and sometimes there is added a warranty against all persons claiming by, from, or under the grantor or releasor.

II. *Devise*. Devise is a disposition of a person's property to take effect after his death. The deed containing this intention is called the testator's *will*. As wills of *real* and *personal* estate require the same solemnities, it will be sufficient to refer to what has been said on this subject in Book III, Chap. V, Sec. IV, for whatever relates to the *execution* and *probate* of a will.

The statute respecting wills and testaments provides that every person twenty-one years of age and of sane mind, lawfully seized in his own right in fee simple, or for the life or lives of any other person or persons, of lands, &c. as well as of personal estate, may give, dispose of and devise the same by last will and testament.

A devise to any one for and during the term of his natural life, and after his death to his children or heirs or right heirs in fee, shall be taken and construed to vest an estate for life only in such devise, and a remainder in fee simple in such children, heirs or right heirs.

If a devise is taken in execution to satisfy the testator's debts, the other devisees or legatees are to contribute proportionately to his remuneration.

Posthumous children not provided for, and children having no legacy in the will and not otherwise provided for in the life of the testator, shall inherit as in cases of intestacy. And any relative of the testator having a devise or legacy, and dying before the testator, leaving lineal descendants, such descendants shall take the devise, &c., and it is presumed in the same proportion as if it had *descended* from the deceased devisee.

It is a rule in the construction of wills, that where a father gives a legacy and afterwards makes an advancement to the child, this is an ademption of the legacy. But it is otherwise in case of a stranger; for what a *father* gives is, as it were, *paying a debt of nature*, and the advancement is therefore the satisfaction of the debt intended by the legacy, but what a *stranger* gives is as a *bounty*, and the advancement afterwards an additional bounty.

In equity it is a rule of presumption that a legacy to a creditor equal to or greater than the debt is intended as a discharge of it. But this is met by another presumption that every bequest is *prima facie* a benevolence. But although our statutes put devises of real and personal estate upon nearly the same ground, it is not to be inferred that a devise of *real estate* to a creditor is to afford a very strong presumption that this was intended as a satisfaction of the debt.

Where double legacies are given in the same or different instruments, it is a question of presumption whether *two distinct legacies* or a *repetition of the same* is intended. In devises of real estate this question could seldom arise.

Latent ambiguities, as a devise to a person where there are two of the same name, or a mistake of the christian name made by the writer of the will, are explained by parole evidence. The testator's declarations immediately *before* and *after* the execution of the will are admitted in explanation, but are to be weighed with much caution and care, and his situation and all the circumstances are to be well considered.

BOOK FIFTH.

WRONGS AND REMEDIES.

In every well regulated community, there should be a remedy for every wrong, and this remedy should be as prompt, plain, easy and adequate, as the nature and circumstances of each case will permit. The Constitution of Maine has provided, (following the great charter of English liberties,) that “every person for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.” But there is to be no expedition at the expense of justice. The party *prosecuted* has *his* rights also. He has a right to trial by jury, and “to be heard by himself and counsel, or either, at his election.”

Injuries are *private* or *public*; *private* when against the rights and immunities of one or more individuals, in which the people at large have but a remote or indirect interest—or *public* when they affect the rights and interests of the State.

Though it is important to the public welfare that crimes should be detected, prosecuted and punished with all possible despatch—that punishment should, in effect, “tread upon the heels of the transgressor”—yet so tender is the law of the rights and immunities of every individual, that no one can be held to answer to a capital or infamous crime but upon a previous presentment of a grand jury, with the exceptions only of

cases of impeachments, and some small offences cognizable by justices of the peace, and such as come within the scope of martial law.

A spirit of litigation will always prevail in a free government and among a civilized people. Slaves have no redress for injuries inflicted, and the remedies of barbarians are force and violence.

“The law’s delay” is, to be sure, tedious and distressing, and calls loudly for reform. But all the evils incident to the administration of justice are not to be compared to the oppression and violence of despotism or anarchy.

PART I.

CHAPTER FIRST.*

COURTS OF JUSTICE.

A court has been defined *the place* where justice is administered, but it is more properly the judge or judges meeting the parties litigant, at established times and places, for hearing and deciding their causes. These courts are all established by law, there being no judicial tribunal in this State held as a *franchise*.

The general remedy for injury, public or private, is by resort to a court of justice. For, although there are cases where a party may prevent injury or attain redress by his own act, as by a defence of his person or that of his wife, child or servant, a recaption of his property, or the abatement of a nuisance, or distraining for rent or trespass—in all these and like cases, the courts of law interpose their authority and measure the remedy according to the injury. So of *accord* and *satisfaction*, which has been considered a redress by the mere act of the parties, the remedy may be as well effected without law as with it, and can scarcely be brought within the scope of “wrongs and remedies.” And as to *arbitration* or reference, the arbitrators or

* Const. and Laws U. S. and Maine. Story's and Kent's Com. Howe's Practice. Story's Equity. Rules S. J. C. Maine, and S. C. and C. C. U. S.

referees are neither more nor less than a judicial court, agreed on, to be sure, by the parties, but by the decision of which, if fairly made, they must abide, however unsatisfactory.

SECTION I.—JURISDICTION.

The jurisdiction of a court is original or appellate, exclusive or concurrent ; where it is exclusive, it cannot be original *and* appellate—where it is concurrent it may be. As an instance—the Supreme Court of the United States has original cognizance concurrent with the District Court, of suits against consuls and vice consuls ; but such suits commenced and determined in the District Court, may be re-examined in the Supreme Court, notwithstanding its original jurisdiction.

Appellate jurisdiction revises and corrects the proceedings in a cause already instituted and acted upon in some other court. From the structure of our government the jurisdiction of the United States Courts may be concurrent with each other and exclusive of that of the States, or it may be exclusive of each other and concurrent with the States, or it may be concurrent in all three. An instance of the last provision is where an alien sues for a tort only in violation of the laws of nations or a treaty. He may commence his suit in the District or Circuit or a State Court. If in the latter, he must begin in that court which has original jurisdiction of the matter. A consequence of this is, that a decision in one of these courts would be a bar to the same suit in either of the others.

SECTION II.—CIVIL JURISDICTION.

The Supreme Judicial Court of the State has appellate jurisdiction *in matters of law* from the State District Court in all

civil cases; and in *law and fact* in all such cases where the value in controversy exceeds two hundred dollars, and in real actions, replevin, and actions against towns.

This court, by virtue of its appellate powers, may correct the proceedings of inferior tribunals by *writ of error*. This is a common law remedy, and it issues to courts proceeding according to the rules of the common law. It re-examines the law only, is a writ of *right*, but must be commenced within twenty years, or in case of minority, coverture, &c., the party may, notwithstanding the twenty years, commence within five years after the disability is removed.

It lies after judgment only, but not where the party might have brought his case to the Supreme Judicial Court by appeal. As it lies only to Courts proceeding according to the rules of the common law, it does not lie to correct the errors of a Court of Probate.

Error *in fact*, such as nonage, want of notice, &c., cannot be joined with error *in law*. In the former case, the issue may be for *the jury*, but upon the law *the court* must determine.

Judgment may be affirmed or reversed, or it may be reversed in part only, if it can be set right without reversing the whole.

But the usual and plainest and simplest way of correcting error is by *exceptions*. If the party is aggrieved by the opinion, direction, or judgment of the State District Court, in matter of law, he may file exceptions thereto; and if they are according to the truth of the case, the Judge shall sign them, and upon the recognizance of the party excepting, to enter his appeal to the Supreme Judicial Court, all further proceedings are stayed in the court below. The Supreme Judicial Court, when the cause is in this manner brought before them, may, upon a hearing of the parties, decide upon the law, enter judgment, grant a new trial, or remand the case back; or if the appellant fails to enter his appeal, may render such judgment as might have been rendered by the court below.

This court has also appellate jurisdiction from the Court of Probate. The appeal must be claimed within one month, and

a bond to prosecute it given and filed in the Probate Office within ten days after, and the reasons of appeal must be also filed there within ten days after the bond. It is to be entered at the next Supreme Judicial Court in the county, whose session shall commence after thirty-four days from the time of the decree appealed from.

In the Court of Probate and on the appeal the examination and decision are by *the court*, except where it appears from the reasons of appeal that the sanity of the testator or the attestation of the witnesses to the will is in question—in either of which cases the appellate court may order an issue to be tried by a jury.

But the State court of ordinary resort is the *State District Court*.* It consists of four Judges, each of whom constitutes a court, in his circuit, consisting of a designated number of counties. A county is an entire district for the administration of justice, and it seems to be entire for this purpose only, as it may be divided for every other.

Its original jurisdiction, with the exceptions named, and cases originating before Justices of the Peace, is exclusive, and in these last it is appellate.

It is a court proceeding according to the course of the common law, and has no equity powers but in cases of mortgage, bonds, and other specialties with penalties, and forfeiture of recognizances in criminal prosecutions, and some few others.

Where an action is commenced before a justice of the peace, and the title to real estate is by the defendant's plea or statement brought in question, the defendant is to recognize to enter his appeal to the next term of this court in the county, and thereupon all further proceedings before the justice are terminated, and the appellant must enter the action and produce copies of the case and enter into recognizance as in other cases of appeal, and the trial is to be had there upon the title, as in an original suit.

From this court, as from the Supreme Judicial Court, causes may be transferred into the Circuit Court of the United States. When a suit is brought in a State Court against an alien, or by

* This Court is so named here and elsewhere to distinguish it from the District Court of the United States.

a citizen of the State where the suit is against a citizen of another State, and the matter in dispute exceeds \$500, exclusive of costs, the defendant may, at the time of entering his appearance, file a petition for a transfer of his cause to the next Circuit Court of the United States for the district, and offer surety or special bail where such is required, to appear and enter his case there, and all further proceedings are stayed.

In a suit where the title to land is concerned, and it shall appear by the affidavit of a party that he shall in the trial rely upon a grant of land from another State, and produce the grant or a copy, or prove its loss, on his motion the other party shall state *his* title, and if it is under a grant from the State where the suit is pending, it may be removed as in the cases just mentioned; but the trial in the Circuit Court shall be upon the title stated, and no other.

The intimate relations between the Federal and State Judiciary are, as we have seen, exemplified in the supervisory power of the Supreme Court of the United States. An attempt has been made to mark the line which divides the exclusive powers of the Federal Judiciary from those which are concurrent with the States, and it has been argued that where the grant extends to "all cases" it is exclusive, and where to "controversies" it is concurrent. But this distinction cannot be sustained. The Constitution has extended the judicial power to "controversies between two or more States." Now this must be exclusive, as no such power, from the necessity of the case, could be exercised by the States; and the judiciary act has given to the Supreme Court, with exceptions named, not only original but exclusive jurisdiction in "controversies" where "a State is a party."

Congress might, no doubt, under the constitutional grant of judicial power, have made the whole, whether extending to "all cases" or to "controversies," exclusive in the federal courts. But it is not so clear that they could confer even a concurrent jurisdiction upon the State courts. That Congress might have left to the States such judicial power as they originally had, to be exercised concurrently with the federal courts

where the jurisdiction is not prohibited by the Constitution, is consistent with the laws of the United States and the practice of the States. But in the instances where Congress has *conferred* judicial power upon State Courts, there can be no constitutional principle to sanction it. The Judiciary is created by appointment of the President and Senate, and Congress can confer no judicial power in any other way.

The appellate powers of the Supreme Court of the United States have been noticed, and it is proper to observe that when we speak of the Supreme Judicial Court of the State, its authority is supreme only in execution of the powers confided to it by the Constitution and laws of the State. There is still behind, a judicial power that in certain defined cases of law or equity can re-examine and affirm or reverse the decision of the highest State court, in the following cases:—

1. “Where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity.”

2. “Where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity.”

3. “Where is drawn in question the construction of any clause of the Constitution, or of a treaty, statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the Constitution, treaty, statute, or commission.”

These three cases embrace the power essential to maintain the supremacy of the government of the Union. It is indeed a transcendent power, and determines ultimately and effectually the limits prescribed by the Constitution to the States and the United States.

In all these cases a writ of error lies to the highest court of law or equity of a State, returnable into the Supreme Court of the United States. The citation is to be signed by the Chief

Justice, Judge, or Chancellor of the State rendering the judgment or making the decree, or by a Justice of the Supreme Court of the United States.

In case of reversal the Court may *remund* the case to the State Court rendering the judgment or making the decree, and if it still adheres to its decision the Supreme Court may proceed to a final decision and award execution.

The errors must appear on the record and no others can be assigned but such as are embraced in the specified cases.

When the defendant in error neglects to appear, the plaintiff shall proceed *ex parte*.

SECTION III.—EQUITY JURISDICTION.

No separate courts of chancery have been established by the State of Maine or the United States—the courts of law exercising all the equity powers granted.

By the Constitution of the United States, the judicial power extends to all cases in law and *equity* embraced in this delegation of power, and it is understood that the equity powers of the United States Courts are claimed to be co-extensive with those of England, where the subject matter is brought within the United States authority. But suits in equity are not to be sustained either in the United States or State courts “in any case where plain, adequate, and complete remedy may be had at law.”

The Legislatures of Massachusetts and Maine have dealt out to the courts equitable jurisdiction with a sparing and cautious hand. Whether from considerations that the science was too refined and sublimated or that the proceedings were dilatory and expensive, or from a jealousy lest the trial of facts might be transferred to the court to the prejudice of the trial by jury, it is certain that these legislatures have not, until very lately, been much disposed to look with a favorable eye on equity powers.

But the equity jurisdiction of this State is making progress, and may soon become co-extensive with that of the United States.

The distinctions attempted between courts of law and equity are not very intelligible. It is said that courts of law have exclusive cognizance of legal rights and defences, and that courts of equity have peculiar cognizance of equitable rights and defences; and yet courts of law merely have equitable powers incidentally, and courts of equity can neither resist the law nor abate its rigor.

The mode and nature of relief, as well as the process, are, however, different in the different courts. Courts of law, in personal and mixed actions, usually award *damages* as compensation for injuries—whereas equity goes further and decrees additional relief. While the law gives the aggrieved party an *equivalent* for the injury, equity enforces *restoration*.

The business of courts of equity, or of our courts of law acting as such, (for we have no separate courts of equity,) is chiefly in granting relief in the following instances, and in these only where there is not a plain, adequate, and complete remedy at common law—but whether the well instructed equity lawyer would ever find this plain, adequate, and complete remedy any where else but on the chancery side of the court, might admit of some doubt.

I. ACCIDENT.

One of the most common interpositions of equity for *accidents* is in cases of lost bonds or other instruments. It grants the relief upon the party's giving a suitable bond of indemnity. To give the court jurisdiction for *discovery* merely, no affidavit of the loss is necessary; but it is otherwise, where there is prayer for relief.

Another class of these cases is that of penalties and forfeitures, and it was for relief of these that the equitable jurisdiction of our State courts commenced; and it was very early in Massachusetts, and among the first acts of legislation in Maine, that provision was made for relief from penal securities and mortgages.

Under the class of accidents, also, is included the case of an administrator, who had received a debt previously discharged and had paid it over to his creditors, and also of the case of an executor who had paid out all his assets and a legatee had been left unpaid.

But it is no ground of relief in positive contracts that the party has been prevented by accident from fulfilment. Nor where the accident arises from the gross negligence of the party seeking relief; nor can it be granted against purchasers for a valuable consideration, without notice.

II. MISTAKES.

A contract made or an act done under a mistake or ignorance of a *material fact*, is relievable in equity.

Thus equity will interfere where there has been a defective execution of a power, but not for its non-execution.

So also to correct mistakes in a will, which are apparent on the face of it, or made out by construction of its terms.

But it is a rule that mistakes in *law* are not relievable in equity. This is the established doctrine in all cases of doubtful and unsettled principles, but the rule has been relaxed to correct mistakes of plain and unquestionable principles of law; and also where one party (say an attorney) understood the law of the case and the other did not; and generally where the case presents a mixed character of law and fact.

But relief is not granted for mistake even of fact, where it arises from inexcusable ignorance, or where the means of information are equally open to both the parties.

Where relief is sought from *written contracts* the mistake must be clearly made out, and the courts will only interfere as between the original parties or those claiming under them in privity, but not as against *bona fide* purchasers without notice.

III. FRAUDS.

The principal benefit of a court of equity is to ferret out fraud; and where the relief sought is beyond the reach of law, its powers are salutary and indispensable. It extends to all cases of misrepresentation and concealment, where a confidence must be reposed. Upon this principle relief is granted in

contracts made from mental incapacity—such as idiocy, insanity, and drunkenness, and even where the imposition arises from the weakness or incapacity of the other party to the contract.

It relieves against unconscionable bargains, fraudulent suppression or destruction of deeds, fraudulent awards, and frauds in the administration of charities and upon creditors.

Constructive frauds embrace a variety of cases, such as marriage brokage, and where a guardian receives a reward for the consent of the marriage of his ward; or bonds or other agreements are made in consideration for obtaining a *will*; obligations in restraint of trade or marriage; contracts for violation of public trust or confidence, for buying and selling or procuring public offices, or accomplishing immoral or illegal transactions; these and many others are among the constructive frauds against which courts of equity will grant relief.

Generally any *bounty* for the execution of an antecedent duty, and any conveyance to the prejudice of existing creditors are included in the class of constructive frauds, against which courts of equity will interpose their relief.

IV. TRUSTS.

Wherever confidence is reposed and one party has it in his power in a secret manner for his own advantage to sacrifice those interests which he is bound to protect, equity will institute a strict and rigorous scrutiny. This embraces the relations of landlord and tenant, partners, principal and surety, executor and legatee, administrator and creditors and heirs, guardian and ward, &c. Though the statute of frauds requires certain contracts to be in writing, yet in a variety of cases, where from fraud, imposition, or mistake, such contract was not reduced to writing, equity will relieve.

V. PARTNERSHIPS.

The equitable jurisdiction of the Supreme Judicial Court of the State in regard to partnerships is a late grant, and is in general terms, and of course the court has herein the ordinary powers of a court of equity.

During the continuance of the co-partnership it will interfere to compel a specific performance.

It will direct renunciations where no time is fixed.

It will grant injunctions against injurious acts of a partner.

It will decree the settlement of accounts even before dissolution, as well as after.

It will decree final dissolution on account of impracticability or the insanity or gross misconduct of a partner; and where real estate is purchased in the name of one by the co-partnership funds, it will decree the title according to equity.

VI. NUISANCE.

The cognizance of this has also been recently assigned to the equity side of the court. By the laws of the State, nuisances from noxious trades may be abated by two justices of the peace, *quorum unus*, who may proceed by the intervention of a jury, and upon their verdict may order the nuisance removed or prostrated, unless the defendant appeals, which he may, to the Supreme Judicial Court—which court may proceed in the same manner and to the same effect. So far as respects such nuisances, the equitable jurisdiction would seem to be unnecessary.

There are other classes to which the equity powers of the *United States* courts extend, not embraced within the statute provisions of Maine.

I. ACCOUNT.

The courts of equity exercise a general jurisdiction in cases of mutual accounts, upon the ground of the inadequacy of the remedy at "common law."

If the interlocutory judgment is that the defendant *shall account*, the auditors are assigned, issues in law or fact are made up before the auditors and referred to the court or a jury.

It is the American doctrine, says a learned judge, that where a court of equity has jurisdiction for *discovery*, and the discovery is effectual, the court may proceed to grant full relief.

Cases of agency, of trusts, of tenants in common, part owners of ships, master and owner, apportionment, average, contribution, liens, rents and profits, and waste, are referred to this title of account.

II. MARSHALLING ASSETS.

This is to arrange assets in due order of administration, or such an arrangement of the different funds under administration as shall enable all parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds. As, where two or more funds exist, and there are several claimants against them and at law, one of the parties may resort to either of these funds for satisfaction, but the other can come upon one only. Here equity will interpose to compel him who has the double lien so to take his satisfaction as not to defeat the other party. This principle is not confined to administration of assets, but may be applied to mortgages which cover two estates, and perhaps to attachments of real property, where the first attachment covers *two* estates and the second but *one* of them and a third the other. In this case, it would seem to be wrong that the first attaching creditor should make his *extent* for the benefit of the *subsequent*, to the prejudice of the *prior* intermediate attachment.

But our statutes of distributions enable us, with few exceptions, to dispense with the interposition of courts of equity in marshalling assets. In this State, all debts, except for taxes, those due to the government, and for the last sickness and funeral expenses, possess an equal rank and are payable alike. And when a debtor dies in a country where a priority of debts exists, still, in regard to creditors, the administration of his assets is to be governed by the law of the country where the administrator acts, and from which he derives his authority. But when the administration is in a country where this priority is allowed, the creditors here must submit to the marshalling of the assets according to the laws of that country. In cases of estates of deceased persons being *insolvent*, the debts due for *taxes*, to the *State*, for the *last sickness*, and *funeral expenses*, have priority—but *in what order*, is not certain. If they are not to be paid *pro rata*, this order would probably be *reversed*.

III. MARSHALLING SECURITIES.

The principle that if one party has a lien on, or interest in

two funds for a debt, and another in one only, equity will compel the former to resort to the other fund in the first instance for satisfaction, applies to judgment creditors and in favor of sureties where the creditor has collateral security or property for the debt.

So if security or indemnity has been given by the principal to his surety the creditor is entitled to the benefit of it, in the hands of the surety to be applied to the payment of his debt. So also if the debt is due and the creditor neglects to call, the surety may compel him.

IV. PARTITION.

Upon the ground of discovery wanted, or where one party has made expenditures or improvements, a court of equity will stay a division until an account is settled. So where there are different parcels or estates to be divided, there may be an *assignment* without a division of each. It is not certain, however, but in most cases in the last instance cited that courts of law might give quite as ample a remedy as courts of equity. Where partition is to be made of estates of deceased persons, the judges of probate have the same power by statute as could be exercised by Judges of the United States acting as a court of equity.

V. CONFUSION OF BOUNDARIES OF LAND.

But equity will not interfere here except where there is no adequate legal remedy. Some peculiar equity must be superinduced—that is, there must be some equitable ground attaching itself to the controversy. If the confusion has been occasioned by fraud, or where it is the duty of one of the parties to preserve the boundaries, or when it will prevent a multiplicity of suits, and in some other cases equity will interpose.

VI. DOWER.

There seems to be a necessity that equity should interpose in cases of dower for a discovery of title deeds or of dowable lands, for an account of mesne profits before assignment, and an ascertainment of the value of the dowable estate, as well as in cases of fraud, accident, or mistake. The statutes of Maine,

however, and the judicial expositions of them, on the subject of dower, are so explicit and remedial, that very little necessity is felt of a resort to a court of equity.

These are the principal cases in which the United States courts entertain equitable jurisdiction not authorized by the laws of the State of Maine.

SECTION IV.—ADMIRALTY AND MARITIME JURISDICTION.

The Constitution of the United States has conferred admiralty and maritime jurisdiction on the United States Judiciary, and the act of 24th September, 1789, has made it original and exclusive in the district courts in all civil cases.

The admiralty jurisdiction is claimed over all maritime contracts executed, and over all cases of a maritime nature, inclusive of questions of prize, whether arising from contracts or from torts; and it is claimed also in suits touching the property in ships, whether they were *petitory*, (where the mere title to the property is litigated and sought to be enforced,) or *possessory*, (to restore to the owner possession which he had under a claim of title.)

Libels for an attempt to export arms contrary to law, and for breach of the non-importation or the non-intercourse laws, if for acts done on waters navigable from the sea by vessels of ten tons burden, being proceedings against the *vessels*, &c., or as the law terms it "*in rem*," are civil causes of admiralty and maritime jurisdiction, and as such cognizable in the district courts.

Suits for seamen's wages are cognizable in the admiralty, though the contract be made on land, provided it be not under seal; and wherever the law raises a lien for maritime service, a court of admiralty has power to carry it into effect. The proceedings are according to the course of the civil law, and are remarkable for their comprehensive brevity and simplicity.

Appeals are allowed to the Circuit Court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds \$300 exclusive of costs; and final decrees and judgments in civil actions in the District Court where the matter in dispute exceeds \$50 exclusive of costs, may be re-examined and affirmed or reversed by writ of error in the Circuit Court, and by like process civil cases in law or equity exceeding \$2000 in the Circuit Court may be thus transferred to and disposed of in the Supreme Court of the United States.

SECTION V.—COURT OF PROBATE.

This is a court neither of common, civil, or ecclesiastical law. Its jurisdiction is exclusively by *statute*. The probate of wills and granting administration is in England vested in the ecclesiastical courts. But our ancestors were careful to confide nothing secular to the clergy, and it is not readily perceived how the settlement of an estate of a deceased testator or intestate could be considered an ecclesiastical concern. Devises, descents, and distributions of estates are indeed as much matters of civil jurisprudence as any thing else which affects the relations of men as members of political society. Still, the subject of the settlement of estates of deceased persons, whether testate or intestate, especially of *insolvent* estates, could not be well examined and adjudicated by the courts proceeding according to the course of the common law, and a jealousy existed of courts of chancery. Under this state of things, courts of probate were established, and have been regulated by various statutes, to superintend judicially the descent and distribution of estates of deceased persons and all subjects connected with them.

Each court consists of a single judge, whose jurisdiction is limited to the county. And in some instances, where the territory is extensive, the county is divided and constitutes two probate districts. Although a court of probate is not *technically* a court of record, yet it ought to keep a perfect record of all its orders and decrees; and orders of notice, among

other things, should be either recorded or filed with the return upon them, and in all important decrees, if previously requested, that fact should be recited in the decree.

The same rules of evidence and of property which are binding upon courts of law, are equally binding upon courts of probate, except where a difference is prescribed by statute.

This court acts without the intervention of a jury. The following are the subjects of its jurisdiction:—

I. INTESTATE ESTATES.

In this case the judge is to grant administration to the widow or next of kin of full age, or both, at his discretion, within thirty days. But the widow, unless incapacitated, is to be preferred; and if she objects, the next of kin will not be associated with her without very good reasons.

When a single woman is co-executrix or co-administratrix, her marriage operates as a resignation; and when she is sole executrix or administratrix, her marriage associates her husband with her in the trust.

Disputed claims of executors or administrators may, with the consent of heirs or legatees, be submitted to *referees* by the judge of probate, and he may receive and allow the report and decree upon it accordingly.

He may appoint appraisers of the *income* of the real estate, and their report, accepted by him, shall be charged against the administrator in his account.

He may compel persons entrusted with any of the property of the deceased to disclose on oath; and in case any one is suspected of concealment or embezzlement, he may order interrogatories; and where the person suspected shall refuse to answer on oath, he may commit him to prison.

He may require the surviving partner to give bond to render an account of the partnership concern, and in case of refusal authorize the administrator to take possession of it; and he may even commit the contumacious partner to prison.

He is to appoint three suitable persons to take an *inventory*, which is to be returned on oath within three months; and where any of the estate lies in another county, he is also to appoint them there.

If the widow or next of kin refuse the administration, the judge may appoint some other person at his discretion.

The administrator is to give bond to the judge of probate to render an inventory within three months, to well and truly administer the estate according to law and settle his accounts with the probate court within a year. Unless the personal estate is sold by order of the judge, the administrator must account for it at the appraisal.

He may grant administration on the estate in his county, although the person die out of the State.

He must examine and approve all probate bonds.

II. WILLS AND TESTAMENTS.

This court has original and exclusive but not final jurisdiction in the probate of wills as well as in granting administration; and when a will has been once proved, approved, and allowed by this court, and the decree is not reversed on an appeal, it is final and conclusive, and cannot be questioned elsewhere.

The executor, knowing of his appointment, must within thirty days either decline the trust or present the will for probate, under a penalty for neglect not exceeding sixteen dollars per month, to be recovered in a suit at law, by any person interested in the estate devised, and where the executor declines the trust the judge shall grant administration with the will annexed to some one else, as in case of an administrator.

Wills must be proved by the testimony of the subscribing witnesses. But where a witness lives out of the State, or more than thirty miles from the court, or is unable from age or infirmity to appear, the judge may take his deposition by *dedimus*, and his testimony will avail as if he were present; and where it shall clearly appear that there is no objection to the will, the judge may decree probate upon the testimony of one or more of the subscribing witnesses.

Executors are to give bonds as administrators, and even where they are residuary legatees, the bond must be conditioned to return an inventory.

Wills duly proved and allowed by foreign tribunals having jurisdiction, may be filed and recorded in the probate office of the county where the estate is, and will operate as a disposition

of such estate. But in this case, the judge must first give notice, and the will is to have no effect unless subscribed and attested as the law of the State directs, nor to give to an alien any other right than if the will was made and approved in the county.

In the case of executors as well as administrators, the judge is to direct the notice of their appointment; and where they remove out of the State and neglect after notice to settle their accounts, the judge may remove them and appoint substitutes.

III. INSOLVENT ESTATES.

If the estate of the deceased is *insolvent*, and so represented by the executor or administrator, the judge of probate is to appoint two or more commissioners to receive, examine, and pass upon the claims of the creditors. The estate, real and personal, is to be sold, excepting the widow's allowances and dower, and after discharging the taxes, debts due the State, and for the last sickness and funeral expenses, the proceeds are to be distributed among the creditors in proportion to their respective dues.

If any one is aggrieved at the doings of the commissioners he may have his claim determined by a suit at law. But the court of probate has no authority to reject or examine a claim allowed or reported by the commissioners. The only remedy for the party dissatisfied is a suit at law, in which case he must give notice at the probate office in writing within twenty days, and prosecute his action as soon as may be.

Executors or administrators dissatisfied with the allowance of a claim, may give like notice at the probate office and to the creditor, and the judge may strike it out of the commissioners' report unless the creditor shall, as soon as may be, prosecute his claim at law or agree with the executor or administrator to submit it to referees—the amount recovered in a suit at law or before referees to be added to the list of claims. No other actions at law are to be sustained, except for debts due the State, for taxes, last sickness, or funeral expenses. Creditors who do not in either of these ways make out their claims, are forever barred of their debts, unless they discover other estate.

Executors or administrators of a deceased creditor, may

join other creditors in discharge of an insolvent debtor, with the approbation and consent of the judge of probate.

If an estate is represented insolvent and on the return of the commissioners proves to be solvent, the executor or administrator, apprehending other claims, may have a *second* commission of insolvency.

IV. PARTITION.

The judge of probate having jurisdiction of the settlement of the estate may make partition of the real estate, including the reversion of the widow's dower, among the heirs or devisees by three disinterested and discreet freeholders of the county, and, if the estate cannot be divided without injury, the judge may direct the commissioners to assign to one or more of the heirs or devisees *the whole*, on payment or security of payment of such sums to the rest, as the commissioners may award. So when a tenement or other real estate amounts to more than a share and cannot be divided, it may be assigned *to one*, on condition of paying the difference; and no conveyance of any heir or devisee shall take from the court its jurisdiction to divide.

If the real estate lies in common with that of others, the judge shall first cause it to be severed before making the partition. Notice is required to all concerned; and minors, and persons incapable or absent, are to be represented; and the division thus made and accepted by the court of probate is conclusive upon all persons interested.

In cases of partition the court may order a warrant of distress against any party who neglects or refuses to pay his proportion of the expense.

V. DOWER AND ALLOWANCES TO WIDOWS.

Judges of probate are authorized to cause dower to be assigned to the widow, and where the dowable estate lies in common, the commissioners are first to sever it—notice to be given as in other cases of partition.

In the settlement of intestate estates, whether solvent or insolvent, the widow shall be entitled to her apparel and such other and so much of the personal estate as the judge shall determine necessary, regard being had to the family under her care. And where an estate represented insolvent turns out to

be solvent, the judge may make her additional allowance. Where the widow relinquishes the provision made for her in the will of her husband, and claims her dower, the judge has the same power as in cases of intestacy. Indeed, the judge may allow the widow *the whole* of the personal estate, unless the amount is so great as to make the allowance extravagant. Where there is no widow, the judge, in cases of insolvency, may make such allowances to minor children.

In the distribution of personal estate, *alienage* of the widow or issue is no impediment.

When the whole estate is used up or absorbed in the expenses of the last sickness and funeral and allowance to the widow, there is no need of a process of insolvency, and the executor or administrator will be exonerated without it.

VI. GUARDIANS.

The judges of probate have the care and superintendence of all *guardianships*, and may appoint guardians to minors and to idiots, lunatics, and persons *non compos*, and their children, and to spendthrifts. These guardians are to give bond, with such sureties as the judge shall direct, to return an inventory, for the faithful discharge of the trust, and settlement of accounts.

The judge may proceed for concealment or embezzlement as in cases of deceased persons.

He may license the sale of real estate of minors, *non compos*, and spendthrifts; and of the two latter where there is *personal estate*, provided he deems it necessary to retain it for the use of their families.

VII. TRUSTS.

Trustees, created by last will and testament, are subject to the supervision of the judge of probate. They are to give bond to the judge of probate of the county in which the will was approved, in such sum and with such sureties as he may direct for the faithful execution of the trust, and "to make a true and perfect inventory of the real estate, goods and chattels, rights and credits" of the deceased, to be returned into the probate office in such time as the judge shall order, and to render an account annually of the income and profits, and to

settle their accounts and deliver over all at the expiration of the trust. This bond may, however, be dispensed with, if the persons for whose benefit the trust was created, of full age and legal capacity, *assent*.

Trustees neglecting or refusing to give bond are considered as declining the trust. They may be permitted to *resign*, first accounting for and paying and delivering over all the property which may have come to their hands. Where no other provision is made for perpetuating the trust, *vacancies* may be filled by the judge, and he may remove any trustees who have become incapable or disqualified and appoint others; and these substitutes shall be subject, under the direction of the judge, to like obligations as original trustees.

VIII. GENERAL POWERS OF COURTS OF PROBATE.

The judge has the same superintendence of public administrators as of others. He must approve of all probate bonds and of the sureties.

In all cases of license to sell real estate, he must require bonds; and to all bonds there must be *sureties*. All committees, appraisers, and commissioners appointed by the judge of probate for any service respecting the estates of deceased persons must be under oath, and a certificate of the oath is to be returned into the probate office.

From every order, sentence, decree, or denial of a judge of probate, an appeal is allowed to the Supreme Judicial Court, as the Supreme Court of Probate.

The courts of probate may compel the attendance of witnesses and punish for contempts.

Although an administration bond is taken to the judge of probate, he is only a mere trustee of the next of kin and creditors, and has no power to submit their rights to reference or arbitration.

This being a court of limited jurisdiction, it must appear upon the face of the decree that he was exercising his power in a case to which it extended.

On a question of jurisdiction the judge must decide at his peril; and if he err, by assuming a jurisdiction which does

not belong to him, his acts are void. But when the question is only as to the *manner* of exercising his jurisdiction, on a subject on which some court of probate has jurisdiction, there, if he mistakes, the means of correction is by appeal.

No power has been given to any court of the United States to settle the estates of deceased persons. Where the jurisdiction has been ceded to the United States for forts, arsenals, dock-yards, &c., the State in which the cession was made exercises all the authority in these matters. In case of the decease of any one within any of these cessions, the judge of probate of the county within which the deceased was an inhabitant, or where the property was found would exercise the jurisdiction and the probate of the will or the appointment of an administrator, and indeed the whole settlement of the estate would be effectual as if no cession of jurisdiction had been made.

There is no doubt that a decree of the Supreme Judicial Court on an appeal from the judge of probate which conflicted with the Constitution or laws of the United States, or a treaty, might be re-examined in the Supreme Court of the United States. But whether a suit *pending* in the probate court of a State, whether of original or appellate jurisdiction, may be transferred into the United States courts, may admit of some doubt. The rights of aliens or of citizens of other States may very often be brought under examination in our courts of probate, and an alien or citizen of another State might have as good reasons to take a question which affected his rights into the United States court, as if he were defendant in a suit at law. But it is apprehended that the acts of Congress authorizing the transfer of pending causes do not reach so far. In such case, the party must await the final decree of the Supreme Court of Probate, and if the error arises from a misconstruction of the Constitution or laws of the United States, or a treaty, the remedy is by writ of error returnable into the Supreme Court of the United States.

SECTION VI.—CRIMINAL JURISDICTION.

It will be readily seen that in a mixed government, such as ours, the courts of the State and United States must have cognizance of the same crimes and offences, when committed within their respective jurisdictions. Thus murder, arson, burglary, &c., are prosecuted and punished under the laws of the State; but if committed within the jurisdiction of the United States, their courts take cognizance of them to the exclusion of the State courts. The proceedings, however, when according to the course of the common law, are the same or nearly so, though the punishments under the United States laws are in many cases more severe.

The criminal jurisdiction of the *Supreme Judicial Court of the State* is original and exclusive in all capital cases, and of those high and aggravated offences for which imprisonment in the penitentiary is prescribed, and which are particularly enumerated in the first chapter of the first book.

Its appellate jurisdiction is only in matters of *law*, and here it is general and exclusive. The removal of a criminal proceeding from an inferior tribunal is either by *certiorari* or *exceptions*. The statute of 24th June, 1820, provides that this court “may by *certiorari* or other legal methods, cause to be brought before them as well indictments or other criminal prosecutions or civil proceedings pending in, as the records of sentences, orders, decrees, and judgments of, any court of inferior criminal or civil jurisdiction, and to proceed, order, and award thereon as is or shall be by law directed.”

A *certiorari* is an original writ issuing in the name of the State from the Supreme Judicial Court to inferior courts or judicial magistrates commanding them to certify or return the records of a cause pending before them. It is a *judicial* writ and lies in all judicial proceedings where a writ of error does not, but is never sued out after a writ of error unless where

diminution of the record is alleged. It is granted on matter of law only. It removes all things done between the teste and return of the writ, but the sureties in the court below are not discharged. The writ, return, and record are enclosed by the inferior court or magistrate, sealed and directed to the Supreme Judicial Court or its clerk. The Supreme Judicial Court determines the law as it appears by the record, and may quash or affirm the proceedings.

But the removal of a criminal process by *exceptions* is allowed as in civil cases, from the State District Court, where the party is aggrieved by the opinion, direction, or decision of the judge in matter of law, and this is the simplest and best way of obtaining redress. It is allowed only to the *defendant* or *accused*, however, as the law in its tenderness will not subject a citizen to be harassed by an appeal after he has been once acquitted.

The *State District Court* exercises original and exclusive criminal jurisdiction in all other crimes and misdemeanors arising under the State laws, except some minor or petty offences cognizable by justices of the peace, of which it has appellate jurisdiction. At this court there is a *grand jury* appointed, or rather *drawn*, to serve at all its sessions during the year in the county, who are *ex officio* conservators of the peace, and whose duty it is individually to present at the session all crimes and offences which come to their knowledge.

The *Supreme Court of the United States* has appellate jurisdiction in criminal as well as civil cases by writ of error to the Circuit and District Courts in matter of law.

Also to the highest court in a State, in the cases already noticed, where the laws of the State are brought in conflict with those of the United States.

The *Circuit Court* is a court of the highest criminal jurisdiction. It has *original* cognizance of all crimes and offences against the laws of the United States, except minor offences cognizable by the District Court, and of these it has concurrent and *appellate* jurisdiction.

The *criminal* admiralty jurisdiction is original and *exclusive* in this court, except in cases of minor offences, where it is

concurrent with the District Court. The cognizance of admiralty cases, criminal as well as civil, is exclusive of the State courts. How far this jurisdiction may be made to extend in our interior waters, and especially upon our great lakes, will be for Congress in the first instance and the Supreme Judiciary finally to determine. No criminal jurisdiction can be exercised by the United States courts, except specially conferred by act of Congress. The trial is by jury of the vicinage, whether proceeding as courts of common law or admiralty; for the Constitution of the United States provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such places as the Congress may by law have directed"—and Congress *has* directed that where the crime was committed without the limits of any State, the trial shall be where the accused was apprehended or into which he was first brought.

The criminal jurisdiction of the *District Court* is, as we have seen, limited to offences where the punishment shall not exceed thirty *stripes*, one hundred dollars fine, or six months imprisonment.

The punishment by *whipping* is abolished in Maine, and is retained in very few cases under the laws of the United States. It has been recently prohibited in *the army*, and cannot be inflicted in *the navy* to exceed twelve stripes for any one offence, unless in execution of the sentence of a Court Martial.

The judges of the courts of the United States are severally made conservators of the peace, and as such may cause to be arrested and held to bail or committed for trial persons accused of crimes and offences against the laws of the United States. But the United States have no other *ex officio* conservators of the peace, unless marshals and their deputies are so considered; these have the same powers under the United States laws as sheriffs and their deputies under the State laws—but neither, it is believed, are *ex officio* conservators of the peace.

The State of Maine has a class of officers whose duty it is

to arrest, examine, and hold to bail or commit for trial persons charged with crimes and offences against the State. These are of different grades, and have different powers. Some are justices of the peace simply, others justices of the peace and of the *quorum*. The jurisdiction of both is limited to the county. There are others who are justices of the peace *throughout the State*. The powers of all of them are both *judicial* and *ministerial*, and though they take the oath to support the Constitution of the United States, and have powers conferred on them to execute the United States laws and to examine and hold for trial offenders against those laws, still the question may arise, whether Congress *can* delegate *any*, especially *judicial* power, to State magistrates. But as the office of justice of the peace seems to be recognized every where, and the powers of these magistrates in holding for trial United States offenders have been long exercised without question, it would seem that so far as practice goes, these might be recognized as United States officers for these purposes. If, however, their authority, in execution of these laws, should be questioned or resisted, Congress might cure the defect by providing similar officers to perform these duties. It would, nevertheless, be matter of regret if these officers should ever decline or be prohibited to execute the laws of the United States, and thereby render it necessary to create a host of petty national magistrates with few official duties, but much business in diffusing executive influence.

CHAPTER SECOND.*

RULES OF PROCEEDING INCIDENT TO COURTS.

In a system such as ours, where special defined powers are conferred on the General Government, and the rest are reserved to the States, and for the execution of these several and distinct powers, courts of justice of different grades of authority are instituted for each, it requires some legal sagacity to determine which of the tribunals has cognizance of the case. There are, however, certain rules or principles of proceeding incident to all our courts, and these, with a notice of the discrepancies, will be the subject of this chapter.

SECTION I.—CIVIL SUITS AT LAW.

The parties are in court, in civil suits, by means of a *writ*, or by *petition*, and sometimes by *complaint*, sued out by the aggrieved party against the alleged delinquent, stating the grievance and demanding redress. The proceedings preliminary to the trial are usually termed the *mesne process*, in contradistinction to *final process* or *execution*; but in our practice, where the writ, petition or complaint includes the declaration or particular statement of the ground of action, and is served upon the defendant in the first instance, it is more properly *original process*.

* Const. and Laws of Maine. Const. and Laws U. S. Decisions S. J. C. Maine and S. C. U. S. Rules of the Courts of U. S. and Maine. Story's Equity. Rules and Articles of War, and Rules and Regulations of the Navy.

The statutes of Maine have prescribed the forms of writs which may issue from the offices of the clerks of the courts, and which issue, as matter of course, in blank, with the signature of the clerk, and to be filled out over his name by the plaintiff or his counsel, with the teste of the Judge, term of the court, parties and declaration. Those most in use are—

Summons, which merely calls the defendant into court by the officer's giving or leaving at his residence a copy, or reading the writ in his presence and hearing.

Capias or *attachment*, which commands the officer to attach the defendant's goods or estate, and for want thereof to arrest the body. In most cases of contract, however, the body is exempted from arrest, and the writ is altered accordingly. Where property is attached on the writ, a summons or notice is given the defendant, stating in brief the suit and its object. Where the body is arrested, it is *held to bail*.

Scire facias, where the officer is commanded to *make known* to the defendant that a judgment or some other judicial proceeding is to be revived against him. It is in the nature of a summons, and is to be served in like manner.

A trustee writ of attachment, in which, in addition to the summons or attachment against the defendant, some other person supposed to be indebted to, or to have goods, effects or credits of, the defendant in his hands, is summoned to disclose on oath, so that judgment against the defendant may be satisfied from the avails in the hands of this trustee. In the chancery proceedings of the U. S. courts, this debtor of the defendant is called the *garnishee*.

Replevin, which is a writ of recaption to retake some property alleged to be wrongfully taken, on giving surety for a return in case of failure in the suit. There are other forms prescribed, adapted to other claims or demands. These, however, are the principal, and the first three are used as well in real as in personal actions.

If the defendant neglects to appear, he is called and *defaulted*, and thereupon judgment is rendered against him, unless absence from the State or some other cause, should render a continuance proper.

If he appears upon the return, he must *plead*, or answer the matter alleged. This is done in writing, and made part of the record.

A direct denial, such as in an action on a *promise* (assumpsit) that defendant *never promised*, or on a judgment, that he *owes nothing*, or in a writ of *disseizin*, (a real action) that he *did not disseize*—are termed *general issues*. But where the defendant sets up a right inconsistent with or adverse to the plaintiff's—such as, in trespass for assault and battery, that it was *plaintiff's own assault*—or in assumpsit, that he never promised within six years—he must plead it *specially*, and to these and other special pleas plaintiff must reply and defendant rejoin, until the parties come to an issue in *fact*, that is to a direct affirmative and negative; or if they come to a point where either party admits the facts as stated, he puts in a *demurrer*—this is joined by the opposing party, and thereupon an issue in law is made up and to be decided by *the court*. By a late statute provision in Maine, the general issue may be pleaded to the merits, in all cases, for the trial and determination of *the facts*, but the defendant must file a *brief statement* of his intended defence.

All questions of fact are determined by a jury. The right to a trial by a jury of the vicinity is guarantied by the Constitutions of the State and United States, in civil as well as in criminal cases—except in cases of equity, civil cases of admiralty, and some small affairs examined and determined by justices of the peace.

A *traverse jury*, or jury of trials, consists of “twelve good and lawful men,” and its verdict must be unanimous. They must be under the age of 70 years, of good moral characters, and qualified to vote for representatives in the Legislature. There are special exemptions of persons whose official or professional duties are incompatible with the service.

The selectmen of each town prepare, once in every three years, a list to be approved in town meeting, and ballots with the name of each are to be preserved in a *box*, from which the quota of jurors for the town is to be drawn, and each, when

drawn, is liable to serve at any one session of a court in the county within three years, but not oftener. The names are drawn out by the selectmen in town meeting, to the number required by the "*venire*" or precept, issuing from the clerk of the court. They are apportioned in local divisions in each county, as near as may be according to the number of inhabitants. After being notified by a constable, they are obliged, under a penalty, to attend. At the ordinary sessions, two traverse juries, (twenty-four) together with three or four supernumeraries to provide for casualties, are required, that while one panel has retired to consider a cause committed to it, a trial may be going on before the other. If a deficiency happens, the sheriff must summons and return *talesmen* to complete the panel. The jurors take an oath that, *in all causes between party and party that shall be committed to them, they will give a true verdict therein, according to law and the evidence given them.* Under this oath, the law makes it their right, as well as their duty, "to try according to the established forms and principles of law, all causes which shall be committed to them, and to decide at their discretion, by a general verdict, both the fact and law involved in the issue," or to find a special or general verdict subject to the opinion of the court upon the law.

The juries being empaneled, the court proceeds to call the actions on the *docket*, (a book on which the names of the parties are entered in the first instance, and numbered.) The cases are taken up in their order; the writ and declaration and pleadings are read, and the case is opened by the party who holds the affirmative. The counsel states to the court and jury the nature of the case, upon what points the issue is joined, and the evidence intended to be introduced. When this evidence is gone through, the advocate on the other side opens the adverse case, and supports it by evidence and argument, and then the party which began is heard in reply.

Evidence to a jury in written proofs are records or writings and deeds of sufficient antiquity; modern deeds or other writings must be attested and verified by parole evidence; no hearsay testimony is admitted; one witness, if credible, is suffi-

cient ; and in cases of accounts and charges on book, the party is allowed the *suppletory oath*.

After the reply, the parties are considered as having finished their evidence and arguments, and the judge sums up the whole to the jury, and gives them his opinion in matters of law arising upon the evidence. The jury retire, under the care of an officer, and when they are agreed they are returned into court, and the foreman delivers a written verdict to the clerk, which is read to them, and the clerk addresses the jury to hearken to their verdict as the court has recorded it, then reads it and says, "so you say, Mr. Foreman, so you say all, gentlemen," and they signifying their assent, the case is finished so far as the jury are concerned. In some difficult cases, the jury give a *special* verdict—that is, they find the facts, but submit the decision of the law to the court.

Next follows the *judgment* upon what has previously passed. But it may be suspended by *exceptions* to the opinion or direction of the judge, or by *writ of error* in matters of law, or by an *appeal*, which, where it is allowed, transfers the fact, as well as law, to a higher court ; or it may be suspended by a motion for a *new trial* filed within the time prescribed by the rules of the court.

In cases where the party has not a remedy by *appeal*, he may obtain a new trial and have his cause submitted to another jury, by shewing to the court that his first trial was not fair, and that the matter in controversy is of sufficient magnitude to justify its interference, having regard to the condition and character of the parties and the subject. The ordinary grounds for a new trial are—1st, Misbehavior of the prevailing party, as by influencing, threatening, or corrupting a witness, or giving the jury evidence after they had left the bar. 2d, Misconduct or mistake of the jury, as by casting lots. 3d, Excessive damages, or such as at first blush appear exorbitant. 4th, Verdicts against law, or against evidence, or manifestly against the weight of evidence ; but in this latter case, a new trial will not be granted where there was conflicting testimony and the balance hung in doubt, nor where the defence was unconscionable. 5th, By misdirection or omission of the Judge in summing up,

refusing or admitting evidence contrary to law. 6th, Unavoidable mistake or absence of witnesses. 7th, Discovery of new and material evidence.

It is a general rule applicable to all our courts, with some exceptions in particular cases, that the party prevailing shall recover his costs.

If the judgment is not superseded or reversed, the next step is the execution, or putting it in force. The writs of execution are of different forms, but so as to meet and execute the judgment—the rule being that the verdict must conform to the issue, the judgment to the verdict, and the execution to the judgment. If the suit was on *contract* the execution is against the goods, chattels and lands; if for a *tort*, it is against the goods, chattels and lands, and for want thereof *the body*. If the judgment is for the defendant in replevin, the execution is for *restitution*, and if, on the return, the property is not to be found, the writ of *withernam*, as it is called, is issued, to take property of like kind.

Where the jurisdiction of the United States courts depends on the character of the parties litigant, that character must be distinctly averred in the writ, otherwise the court will have no jurisdiction, and the defect is not cured by or amendable *after* the verdict. As the government is one of limited powers, so the courts are limited in their jurisdiction, and where *the parties* give the jurisdiction, such as alienage or citizenship of another State, their character as such must be distinctly averred. In case of citizens of different States, if the party plaintiff, for instance, is composed of different persons, and any one is a citizen of the same State with the defendant, it takes away the jurisdiction. It is the same in case of alienage, and if a corporation sues in that capacity, it must appear by distinct averments that all the members are of the requisite character. No contrivance to defeat the law and create a jurisdiction by fraud, such as a collusive deed to a citizen of another State for the sole purpose of making him a nominal plaintiff, or a *pretended* residence in another State, would be tolerated. Yet if a man, *though for the sole purpose of giving the court juris-*

diction, removes himself and family to another State with a bona fide intention to reside there, he becomes instantly a citizen, and may sue in those courts.

Suits in these courts must be brought in the judicial district where the defendant resides. This consists of the jurisdiction of a District Judge, which cannot exceed the limits of a State, but in some instances is less.

Suits in the State courts concerning real estate must be brought in the county where the lands, &c. lie. In personal actions, they must be commenced in the county where one of the parties has his residence. Persons living out of the State must commence in the county where some one individual of the party defendant has his residence. In either case, the domicile of any one member of the party plaintiff or defendant would seem sufficient to give jurisdiction.

SECTION II.—SUITS IN EQUITY.

The original process is by “BILL IN EQUITY,” setting forth the circumstances of the case at length, and that “the orator is wholly without remedy at common law,” praying relief, and also for process of *subpœna* against the defendant to compel him to answer upon oath all the matter charged in the bill; and if it be to stay *waste* or stop proceedings at law, an *injunction* may also be prayed at the same time.

The bill must be signed by the counsel, and must call all necessary parties, however remotely interested, before the court, otherwise no decree can bind them.

By the rules of the Supreme Judicial Court of this State, the bill must contain a full, clear, and explicit statement of the plaintiff's case, avoiding all unnecessary prolixity and repetition. The *interrogatory* requires that the defendant shall answer all matters contained in the bill, not only according to his positive knowledge of the facts stated, but also according to his re-

membrance. And the plaintiff may, if his case requires it, propose *specific* interrogatories, and allege by way of charge any particular fact for the purpose of putting it in issue.

The bill may be in the usual form of a bill in chancery, or inserted in an original summons or writ of attachment, and may be filed in the clerk's office in vacation, and thereupon a *subpæna* issues of course upon the application of the plaintiff or his solicitor, returnable at the next term, and must be served at least fourteen days before the return day. But when the bill is filed in term time, the *subpæna* is made returnable when the court shall order, but notice shall be at least fourteen days before the return day.

The plaintiff may in all cases serve the defendant with a copy of the bill at the time of the service of the *subpæna*, and if this is done *sixty days* previous to the day of return the defendant is held to answer, unless he can show sufficient cause for delay.

The rules of court provide when answers and replications shall be filed, and when, how, and upon what notice depositions are to be taken.

By the rules of the Supreme Court of the United States, which are adopted by the Supreme Judicial Court of the State, until others of their own are substituted, all process is made returnable to the next succeeding term or to any intermediate *rule* day, at the election of the party applying, and the return of it "executed" shall be effectual whereon to ground subsequent proceedings. If the person is not found, a copy shall be left with his wife or any free white member of his family; and where this process is not executed, the clerk shall, at the request of the party, issue another, and if upon *this* second process the party is not found, another is to be issued, and if upon the return of this there is another failure, the same proceedings may be had as upon process "executed."

By a rule of the Supreme Judicial Court, if the defendant neglects to appear on the return day of the *subpæna*, having been served fourteen days previous with personal notice of the suit, the bill may be taken as *confessed*.

If the defendant cannot be found, nor any person upon whom to serve the process, newspaper notice may be directed by the court.

The defendant, if he appears, may *demur*, *plead*, or *answer*.

If, on demurrer, defendant prevails, the bill is dismissed; if the demurrer is overruled, he is ordered to plead. The plea may be to the *person*, to the *jurisdiction*, or *in bar*. But in bills containing various matters, the defendant may demur or plead as to part, and answer as to the residue. But where the bill charges fraud or combination, a plea to such part must be accompanied by an answer fortifying the plea and explicitly denying the fraud and combination and the fact on which the charge is founded. The defendant may, instead of a formal demurrer or plea, insist on any special matter in his answer, and have the same benefit of it as if he had pleaded or demurred.

Every answer must be fortified by oath, which may be administered by any justice or judge of the State or United States, or any person appointed by the court, or by a judge or by any justice of the peace or notary public of any State or territory.

If the plaintiff finds sufficient matter confessed in the answer upon which to found a decree, he may proceed to a hearing of the cause upon the bill and answer, but in that case he must take the defendant's answer to be true in every point.

Where issue is joined upon a contradiction of facts, the proof must be by examination of witnesses, and their depositions are taken in writing. For such purpose, short and pertinent interrogatories and cross-interrogatories are formed in writing by the parties, which alone are to be put to the witnesses, and a commission or *dedimus* is sent to some person (a judge or other magistrate, usually,) to take *the deposition*. This consists of the interrogatories and answer to each, with the magistrate's certificate of the oath and caption annexed, and is to be returned sealed up directed to the court or its clerk, stating in the superscription the contents of the envelope.

The decree of the court is either *interlocutory* or *final*. The *first* is seldom the *final* decree, and where the facts are strongly

controverted a feigned issue may be made up and submitted to a jury.

When the final decree is made, the performance is enforced by the commitment of the person or the sequestration of his estate.

If either party is aggrieved, he may petition for a re-hearing.

A bill of *review* may be had upon apparent error of judgment, or discovery of new matter or evidence.

Where according to chancery practice a bill of *revivor* would be necessary, the original bill may be amended and new parties plaintiff or defendant may be added where changes have taken place by death or otherwise—*subpœnas* to be issued to *new* as to *original* defendants; and when a *supplemental bill* becomes necessary, it may be dispensed with by inserting the new matter in the original bill at any time before the decree, but new matter of defence requires new notice.

By a rule of the Supreme Court of the United States it is provided that “in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the practice of the high court of chancery in England,” and by a rule of the Supreme Judicial Court of Maine, the practice of the Supreme and Circuit Courts of the United States is adopted so far as the same is not repugnant to the Constitution and laws of the State, or changed and simplified by the rules of the former.

An attempt is here made to present an outline of the process in equity in the State and United States courts. The limits of this work will not permit any thing more than an outline, and that, it is feared, a very imperfect one. In a science so little understood by the members of the profession, and so little relished by most of them, and involved withal in such prolixity and obscurity, if a *glimpse* of light can be elicited in a work like this, it is quite as much as ought to be expected. When it is considered that bills in equity are either *original* or not original—that the former are those which pray relief or those which only seek protection, &c., those of the latter to perpetuate testimony or for discovery—that there are *supple-*

mental bills and bills of *revivor*—that an original relief bill is made to consist of *nine parts*, each requiring a distinct commentary to adapt it to the understanding of *the profession*—and add to all this the demurrers, pleas, answers, inter-pleaders, *certioraris*, disclaimers, amendments, and other incidents, and it will be readily perceived that to attempt a perfect analysis in the few pages which can be here afforded, would make confusion worse confounded.

SECTION III.—ADMIRALTY CIVIL PROCESS.

The proceedings are against *the person* “*in personam*,” or against *the thing* “*in rem*.”

In the admiralty, the libellant and claimant are both *actors*.

In all proceedings *in rem* the admiralty has a right to order the thing to be taken into custody, and it is presumed to be in the custody of the law unless the contrary appears; and the thing does not follow the appeal into the superior court, but remains in the custody of the court below, which has a right to order it to be sold, if perishable, notwithstanding the appeal; but the appeal suspends the sentence, and the cause is tried *de novo*.

In every proceeding against a ship to subject her to the payment of a debt, or to acquire possession of her on account of title, the regular course is that the court takes her into custody, and holds her for the party having right.

An admiralty court has jurisdiction to sustain a libel to carry into effect the decree of another admiralty court. The decree of such court “*in rem*” is conclusive upon all the world. It is incident to the possession of the cause that the court may decree the sale of a vessel and cargo in its custody, and the sale under such decree is conclusive of the title.

The process is by *LIBEL*, stating briefly and simply the ground of the suit. Amendments in matter of form may be had at any time, as of course, and new counts may be filed,

and amendments in matter of substance are allowed upon such terms as the court shall impose.

In case of arrest and bail, the respondent must appear at the return day of the warrant, and submit to commitment, or give *stipulation* with sureties to abide the result; and on failure the execution shall issue against him and them, their representatives or property, wherever the same may be found.

At the time of entering into this stipulation, the court will, on motion of the sureties, direct the defendant to file a stipulation to indemnify them.

There are cases under the rules where new stipulations may be required or allowed, and on motion of defendants the court may direct the plaintiff (except where the suit is in behalf of the United States) to give stipulation with sureties to abide the result, on pain of the dismissal of his bill.

If after arrest defendant does not appear, he is deemed in default and contumacy, and his bail or stipulation will be adjudged forfeited, and the court may proceed to hear *ex parte* and pronounce the proper decree.

In case the party cannot be found, and return so made, the plaintiff may have a warrant to attach his property, and may, at his option, have inserted therein a clause of foreign attachment; but all attachments, under admiralty process, may be dissolved on the party's giving a stipulation with sureties, as in cases of arrest.

There are the same proceedings in cases of attachment, if defendant appears as in cases of arrest.

In all foreign attachments the *garnishee*, as he is called, is examined on oath as to the property of the respondent in his hands, and judgment will be against such property or not, according to his disclosure or other evidence.

In proceedings *in rem*, the claimant must verify his claim of property by affidavit and file a stipulation with sureties for payment of all costs in case of failure.

If the property is perishable, the court will, on application of either party, direct an appraisement and delivery on payment of the value into court, or a sale, as the circumstances may require.

Where the case is not otherwise provided for by statute, the court will, in its discretion, deliver the property to the claimant, on giving stipulation with sureties to the amount of the appraised value, to abide the result.

In case of failure of the obligor in the suit, execution may, after ten days, issue against all the parties to the stipulation. Both plaintiff and defendant may require of each other personal answers on oath to interrogatories to be filed in court, touching the matters contained in the answer and libel respectively, and whatever else may be relative to the suit.

If either party, decreed to give personal answer, neglects or refuses, such party is deemed in default and contumacy, and, if plaintiff, the suit shall be dismissed—if defendant, the allegations in the libel shall be taken *as confessed*, and the court will thereupon hear and determine the cause *ex parte*.

If the plaintiff fails to prosecute, or neglects to comply with the orders of the court, the defendant shall be dismissed with costs, and upon like failure or neglect of the defendant, the court will hear the cause *ex parte*, and pronounce the proper decree.

In admiralty and maritime suits *against the person* "*in personam*," where a stipulation has been filed in court, and the decree is against the defendant and not satisfied within ten days, (no appeal intervening) execution, without further delay, will issue against all parties to the stipulation, and surrender of principal will be no discharge of the stipulation, unless by consent of the plaintiff.

If a third party intervene, in a suit *in rem*, he shall give stipulation with sureties to ratify the acts of his proctor and abide the result; and where a decree of possession or first decree shall have passed before the intervention of such claim, the intervener shall pay costs to the plaintiff, and, on motion of the defendant, the court will direct the plaintiff to give a like stipulation to the intervener as in common cases to the defendant.

SECTION IV.—CRIMINAL PROCESS.

The punishment of crimes is a trust so important and delicate, that settled rules of proceeding are essential, lest the guilty should be acquitted and the innocent convicted. Every violence against the public is a crime or misdemeanor, but the right to punish is in *that public* against which the injury is inflicted. The criminal jurisdiction exercised in the State of Maine reaches every individual in a two-fold character—as owing allegiance to the State and the United States; and he is liable to prosecution and punishment from that power against which his crime or offence was committed. Strangers to our institutions find it difficult to understand this *two-fold allegiance*, and supposing that it must be necessarily *adverse*, might well infer a hardship upon the citizen that he should be subjected to two jurisdictions at the same time, whose claims upon him would conflict with each other. But when we reflect that the jurisdictions or sovereignties are entirely distinct, that the duties of the citizen to each do not at all interfere, nor are the rights of protection from each in the least impaired by the other, it is, instead of a defect, the excellency of our system. The laws of the State render protection and demand obedience in almost every *domestic relation*. Those of the United States protect and defend the citizen in his *exterior* concerns. So that punishment is inflicted by the different tribunals for the violation of the laws of different sovereignties, in perfect harmony with each other. When, by error of legislation or assumption of jurisdiction, one of these powers is *made* to conflict with the other, the Supreme Judiciary of the United States must interpose its transcendent authority, and restore the balance. Should a State court, for example, entertain jurisdiction of an indictment found against an ambassador or other public minister, and overrule a plea to the jurisdiction, in defiance of the Con-

stitution and laws of the United States, which give the Supreme Court original and exclusive jurisdiction, that court could annul the proceeding. And deplorable indeed would be our condition if it were otherwise, and the peace of the Union might become the sport and caprice of every member.

On the other hand, had Napoleon Bonaparte, after his abdication, escaped and taken refuge in Maine, as a private individual and not as a fugitive from justice, having violated no known law of nations or of France, no power in the United States or elsewhere would have had the right to demand him.

The criminal jurisdiction of the United States and State courts proceed alike according to the course of the common law, and by the intervention of a *grand* and *petit* (or *traverse*) jury. The admiralty is not even an exception. The jurors of both descriptions are *drawn* and summoned to attend by the same process, and have the same qualifications and are subject to the same duties and liabilities as the jurors in civil suits.

In each court of criminal jurisdiction the accused has the *rights*—To be heard by himself and his counsel; to know the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have a speedy, public and impartial trial, and, except in cases of martial law or impeachment, by a jury of the vicinity.

The preliminary step in the prosecution for crimes and offences, is an examination of the charge before a grand jury. This is to consist of less than twenty-four and more than twelve. The oath is—

“You, as grand jurors of this inquest for the body of this county of —, solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State’s counsel and your fellows’ and your own you shall keep secret; you shall present no man for envy, hatred or malice; neither shall you leave any man unrepresented for love, fear, favor, affection, or hope of reward; but you shall present things truly, as they shall come to your knowledge, according to the best of your understanding. So help you God.”

After this oath is administered, the Judge gives them in charge the crimes cognizable at that court and their legal obligations, and thereupon they retire and elect their foreman, who is, in the presence of the prosecuting attorney, authorized to administer oaths to witnesses brought before them.

The evidence is presented to them and examined *ex parte*, and twelve at least must concur to find an indictment, or *charge proved*, against the accused; and when twelve do concur, the foreman must sign and certify it a true bill, whether he agreed to the finding or not, and then it is countersigned by the Attorney General or other prosecuting officer, and presented in court, and thereupon the defendant is brought in to answer.

No person can be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury, with the exceptions of impeachments, military offences, and such as are cognizable by justices of the peace.

“The indictment is a plain, brief and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature.”

It must be framed with sufficient certainty, in the English language—without abbreviations or figures—must allege where and in what county the crime was committed—or if on the high seas or in a foreign port—the name and addition of the defendant—the names of third persons, or that they are unknown—the time and description of the offence, technically—and the conclusion must be that it is contrary to law, or, if a statute offence, contrary to the form of the statute in such case made and provided, and against the peace of the State, or United States, as the case may be.

If the defendant has been previously arrested and held to bail or committed for trial, he is brought in and arraigned. But if he is not taken or does not appear, a warrant or *capias* issues to hold him for trial at the same or the ensuing term. If he is not found, the process may be repeated, or the court may proceed to process of outlawry.

When the defendant does appear, whether voluntarily or by compulsion, he is *arraigned*. If the offence is *capital*, the

prisoner is placed at the bar and commanded to hold up his right hand—the indictment is read to him by the clerk, who demands of him “what say you, A B, are you guilty or not guilty?” If he answers not guilty, the plea is minuted on the back of the indictment, and the clerk enquires “how will you be tried?” the prisoner answers “by God and my country”—and the clerk replies, “God send you a safe deliverance.”

There are other pleas to the indictment, however, of which the prisoner may avail himself—1st, To the *jurisdiction*, as where he is indicted in a State court and the offence alleged was committed on the high seas and without the body of a county. 2d, *Demurrer*, allowing the facts charged to be true, but denying that the crime is what it is alleged to be. 3d, *Abatement*, as misnomer, or false addition of the prisoner. 4th, *Former acquittal or conviction* of the identical crime; for “no person, for the same offence, shall be twice put in jeopardy of life or limb.” But if the prisoner avails himself of none of these, he is, on a time assigned, put on his trial on the issue of “*not guilty*.”

Capital trials are proceeded in with great order and solemnity, as the crimes are few which are punished with death, and very few such trials occur. There is in Maine, and indeed in all New England, an innate horror at shedding human blood, and when the crime charged is murder, and blood for blood is demanded, there is a double solicitude lest on the one hand the guilty should escape, or, on the other, the innocent should suffer.

In a single capital case, the court generally orders the *venire* for three full juries, thirty-six. This is done that there may not be a failure of a panel, as the prisoner has a right to *challenge* (set aside) *twenty* without assigning any cause, and as many more as he can impeach for cause that should disqualify them. This challenge *for cause* may be exercised also by the government’s counsel.

In the process of empanneling, the prisoner at the bar, who has a list of the jurors alphabetically arranged furnished him, stands, and the clerk proceeds, naming him distinctly—“You

are now set to the bar to be tried, and these good men whom I shall call are to pass between you and the State on your trial; if you would object to any of them, you must do it as they are called and before they are sworn." The first juror on the list is called and rises—"Prisoner, look upon the juror; juror, look upon the prisoner." The list having been previously examined by the prisoner and his counsel, if it has been concluded to reject him, the prisoner says "challenge," and he is set aside, and the clerk proceeds with the same formalities to the next, who, if not objected to, is directed to hold up his right hand and the following oath is administered—"You swear that you will well and truly try and true deliverance make between the State and the prisoner at the bar, whom you have in charge, according to your evidence: so help you God." This process is continued until the twelve are sworn, and a foreman being appointed by the court the trial commences. The indictment is read to the jury by the clerk, who states to the jury the indictment and issue, and then adds "if he is guilty you are to say so, if he is not guilty you are to say so, and no more. Gentlemen, hearken to your evidence." The prosecuting officer, the official organ of the government, then opens the case by stating the crime and the proof which he expects to produce. After this is gone through, the witnesses examined and cross-examined, and other proof offered, discussed, and allowed, the defendant's counsel opens for the prisoner, stating the defence and what he expects to prove; and after this, the senior counsel addresses the jury in the prisoner's defence, and the prosecutor replies. The controversy being now finished, the court sums up the whole and states the law arising upon the evidence. The jury then retires under charge of an officer, and are to be kept together and secluded until they are agreed. When they return into court, and the prisoner is called and the names of the jurors are called over, the clerk asks if they are agreed on a verdict—and if they answer in the affirmative, the indictment is handed in and the prisoner directed to hold up his right hand, and the clerk asks the jury "who shall speak for you?" Some one answers, "the foreman." "What say you, Mr. Foreman, is A B, the prisoner at the bar, guilty or not guilty?"

If the verdict is guilty, he is *remanded* into custody. If the verdict is that the defendant is not guilty, he is discharged and permitted to go "*without day.*"

After trial and conviction, judgment follows, unless something intervenes to arrest or set it aside. As, after conviction and before judgment by a *new trial* for any error or misconduct of the court, counsel, witnesses, or jurors, or any one else concerned in the trial; or it may be arrested, 1st, by matter *foreign to the record*, as where the court had no legal authority; 2d, by *writ of error* from the Supreme Judicial Court to the Supreme Court of the United States in the specified cases; 3d, by *pardon*, which will avail *after* but not *before* conviction. If, after all, the verdict stands, the prisoner is brought into court and the judge or chief justice asks him if he has any thing to say why judgment shall not be pronounced against him; and if nothing that is material is further offered, the judge states to him the nature of the crime, the advantages he has had of a trial, and the result, and recommends him to repentance in hope of divine mercy, and then proceeds to pronounce—"that you be carried from hence to the place from whence you came, and thence to the place of execution, where you are to be hanged by the neck until you are DEAD, DEAD, DEAD, and the LORD GOD have mercy upon your soul." The proceedings in the United States courts are nearly the same.

The execution is to be performed, if the crime is against the State, by the sheriff, or if against the United States, by the marshal—but no execution is to take place under the State laws until a year after judgment, nor until a full copy of all the proceedings, under the seal of the Court, shall be certified to the supreme executive authority, and a warrant therefrom under the great seal of the State, with the copy annexed, shall be delivered to the sheriff.

In cases not capital no peremptory challenge is allowed, and the solemnity of the prisoner's holding up the hand and a distinct call for jurors and prisoner to look at each other are dispensed with; the oath also differs, and is in the following form—"You swear that you will well and truly try the issue

between the State and the defendant according to your evidence. So help you God."

In minor offences the defendant is not put to the bar, but is admitted to sit by his counsel.

The general powers incidental to all courts are to administer oaths and punish for contempts.

And the Supreme Courts, both the State and United States, may issue writs of *certiorari*, *mandamus*, and *injunction*—and make rules for the regulation of business and admission of attorneys and counsellors.

SECTION V.—COURTS MARTIAL.

A peculiar characteristic of military tribunals is an officer to appear and act on *both sides*—*for* and *against* the accused. This officer is the *judge advocate*. He may be appointed by the President of the United States or by the President of the court. A State court martial is like that of the United States, except that it emanates from State authority.

General courts martial may consist of not more than *thirteen* nor less than *five* members. But thirteen is required, if the interest of the service permits. When this number is designated, supernumeraries are detailed to fill casual vacancies.

Any general officer of the army or colonel commanding a separate department, may appoint general courts martial.

Officers of marines and land forces may be associated on these courts, and the senior of either corps must be obeyed.

The judge advocate administers the oath of *impartiality* and *secrecy* to each member, and the President then administers the oath of secrecy to the judge advocate.

Officers commanding regiments and corps, or garrisons, forts or barracks, may, in cases not capital, appoint courts martial, to consist of *three* members. But they are not permitted to try commissioned officers, nor to inflict a fine above one month's pay nor imprisonment for a longer term than a month.

The prisoner, when arraigned, should plead to the charges; but if he stands mute, he is to be tried as if he had pleaded not guilty.

Challenges *for cause* may be made against the members of the court, as against jurors.

Witnesses are sworn and examined as in other courts, and depositions may be taken in cases not capital, with notice to the adverse party.

Courts martial have the power to protect themselves against contempts and insults, by punishing the aggressor at their discretion.

The officer of the guard or provost martial is to keep in custody the prisoner, and to give notice of the arrest.

An officer *arrested* is deprived of his sword, and confined to his quarters, &c., and if he leaves without permission he is to be *cashiered*.

The charges should be *precise* and *specific*, and facts of a distinct nature are not to be included in the same charge or specification, and all extraneous matter is to be excluded.

The prisoner must appear without *bonds*, unless there be danger of escape. He must plead directly, not *argumentatively*, either that he is guilty or not guilty.

In case the prisoner pleads guilty, the judge advocate may nevertheless (if the case requires it) offer evidence to show the character of the offence and extent of the guilt.

Though the judge advocate is, *ex officio*, the prosecutor, yet the accuser, if an officer, may take part in the prosecution.

Both prosecutor and prisoner may be allowed *professional* aid, but the counsel are not to address the court, nor interfere with the proceedings.

Preliminaries being arranged, the prosecutor calls his witnesses, who are *sworn* or *affirmed*, and he proceeds in the examination, and the questions and answers are taken down in the proceedings. He also offers his written or documentary evidence, and the questions as to the admissibility of testimony are nearly the same as in a court of law.

The prisoner then proceeds in his defence, and the principles of defence are nearly the same as in other tribunals. After the examination is through, he makes his defence upon the whole evidence, in a *written argument*, read by himself or his

counsel, to which the prosecutor, by himself or counsel, has a right to reply. But in his replication he is not allowed to introduce fresh evidence, unless to controvert new matter introduced into the defence.

A rejoinder is not a matter of right, and is never permitted, except when the evidence produced in the reply requires it.

The trial being finished, the court is closed, and proceeds to deliberate on its *verdict* and *sentence*.

Sentence of death requires the concurrence of two thirds of the members.

The usual punishments of an officer are *cashiering*, *dismissal*, *reprimand*, and *suspension from rank, pay, and emoluments*.

The usual punishment of non-commissioned officers is *reduction*, but further penalties may be added, according to the case.

The usual punishments of a soldier are, *imprisonment*, solitary or otherwise, *hard labor*, and *stoppage of pay*. The punishment by *whipping* is abolished.

The officer ordering the Court Martial may reprieve and pardon, except in cases of *death*, in which he may *suspend* until the pleasure of the President of the United States be known.

No sentence of a Court Martial can be executed until it is *approved* by the officer who ordered the court; and no person shall be tried twice on the merits for the same offence, nor unless the act charged was committed within two years.

The original proceedings of all general courts martial are, after receiving the final action of the approving officer, to be sent, for safe keeping, to the office of the Adjutant General.

By the rules and regulations for the government of the Navy, the courts martial are established upon principles similar to those of the Army.

General courts martial may be convened as often as the President of the United States, the Secretary of the Navy, or the commander-in-chief of the fleet, or the commander of a squadron while acting out of the United States, shall deem it necessary.

The court is to consist of the same number, and not more

than half, exclusive of the President, shall, if avoidable, consist of *juniors* to the accused.

The oath to the members varies in form, but is substantially the same as in the Army, and that to the judge advocate is also similar, with the addition that he shall make a true record of the proceedings.

The charges are required to be equally specific, and like notice is to be given.

The decorum of the court, their punctuality in attendance, and the obligations of witnesses to appear and testify, are all prescribed, and the conduct of the prisoner in submitting to the arrest and delivering up his sword, are accurately defined. Sentences are determined by a majority of votes, except sentences of death, which require two thirds.

In sentences of *suspension* of an officer, the court may also suspend his pay and emoluments. The sentence must be approved, if capital, by the President of the United States; if not capital, by the officer ordering the court.

The President of the United States, or, when the trial takes place out of the United States, the commander of the fleet or squadron, may pardon, after conviction, any offence against *the articles*, or mitigate the punishment.

Courts of inquiry may be instituted both for the Army and Navy, to consist of not more than *three members*, who are merely to ascertain and state facts, but are to give no opinion, unless expressly so required in the order for convening them. To this end they are to be sworn, as also the judge advocate, and have power to compel the attendance of and examine witnesses and receive testimony.

The proceedings are to be authenticated by the President and judge advocate, and may be evidence in courts martial, except in capital cases and those extending to the dismissal of a commissioned or warrant officer.

PART II.

PRIVATE REMEDIES.

IN every well regulated community there should be a remedy for every injury ; and this remedy should be as prompt, plain, easy, and adequate, as the nature and circumstances of each case will permit. The Constitution of Maine (following the great charter of English liberties,) has provided that “every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law ; and that right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.”

But there is to be, nevertheless, no expedition or despatch at the expense of justice. Both parties have their rights, and to a hearing before a jury by themselves or counsel, or both, at their election.

Private injuries are those which are against the rights and immunities of one or more individuals, in which the whole community has but a remote or indirect interest. An action or suit is the lawful demand for redress.

CHAPTER FIRST.*

PERSONAL ACTIONS.

Personal actions are those whereby a man demands a debt or duty, or damages in lieu thereof, or for an injury done to his person or personal property.

SECTION I.—INJURIES TO PERSONS.

I. These are such as affect his *liberty*—as

1st, *Unlawful imprisonment.* Every unlawful detention of a man's person against his will is an imprisonment, and entitles him to damages by action of trespass. But as damages cannot in many cases be adequate compensation for the loss of liberty, the laws have superadded the remedy by *habeas corpus*, which examines into the right of detention, and if it is unlawful, liberates him—after which, he may also resort to his action for his damages. And so strong is this regard to personal liberty that the law not only gives to the injured party damages which are generally exemplary, and restores him to that freedom of which he was unjustly deprived, but it punishes the perpetrator as for a public offence.

2d, *Depriving a man of his elective franchise.* As without the preservation of this right inviolate, liberty could not be long preserved, the courts of justice guard it with a vigilant eye. An action on the case for damages will be sustained against the

* Const. and Laws of Maine and U. S. Chitty's Bl. Kent and Story's Com. Const. and Laws of Maine. Jones and Story on Bailments.

officers of a town or religious society for refusing a man the exercise of his civil or religious franchise, even without proof of malice or intention to oppress; but where a wilful deviation from duty, and a wanton rejection of a vote from party motives, or personal hostility, or even a negligent or inattentive examination of the claim, is proved, exemplary damages will be required as a compensation to the injured party, and an expiation of the high and aggravated offence against the civil or religious privileges of the citizen.

II. Injuries which affect *reputation* are both *public* and *private*. The civil remedy is by action of trespass on the case—

1st, *For slanderous words spoken, or for libelous words written, printed, painted, &c.* In a free government, where all may aspire to the highest honors, character is valuable to all. The motives to ambition are stronger and more general; competition provokes jealousy, and induces detraction. Rival aspirants are assailing each other, their respective friends and partizans engage in the controversy, and each is striving to reduce the other below himself. As free discussion induces a free use of character, and this freedom degenerates into licentiousness and scandal, juries should be careful to give ample indemnity in these cases to correct the depravity and prevent a resort to more fatal remedy.

2d, *Malicious prosecution*. Here, too, the injury is public as well as private, and the remedy for damages is an action of trespass on the case, in which the plaintiff must allege and prove malice or want of probable cause—or rather facts and circumstances from which the court may infer such want of probable cause. But unless the charge against the plaintiff was not only groundless but *apparently so*, public policy will protect the defendant. For it would be an encouragement to the commission of crimes, if every prosecutor was liable, in case he failed, to make good the charge.

III. Personal injuries affecting *special relations*.

Abduction, or taking away a man's wife, is of this character. If she be *enticed* away, the remedy is by action of *trespass on the case*. If the injury be adultery or criminal conversation, it

is *trespass* against the adulterer, in which case the damages are usually very large and exemplary. But no action can be sustained by the wife for an injury done to the husband, even after his death—and, strange as it may seem, though the injury may have caused his death.

It is lamentable, indeed, that no action can be maintained by a female against her seducer. If she can prove no promise of marriage, she has no remedy for the seduction. And if she is under the government and protection of her father, he has no other remedy for the injury but for *loss of service*. If the daughter is of age, no damages are recoverable by the father unless she is at the time in her father's house, so as to constitute in law and fact the relation of master and servant. It is unaccountable that for an injury so fatal to the peace of the parent and so utterly destructive of all hopes of the child, the law should provide no remedy, or one so entirely inadequate. If the daughter is in no condition to render service, as while she is receiving instruction, and therefore an *expense* instead of a *profit* to the parent, he has no remedy for a wound inflicted on his domestic comfort and peace, which is almost immeasurably severe.

The law has provided ample redress in the relations of guardian and ward, and master and servant. In the former, the guardian has his remedy by action for damages when his ward is stolen away or ravished; and in the latter, to entice away, beat, or injure an apprentice or servant, subjects the aggressor to an action by the master for *loss of service*. Consequent upon this right to service, is the liability of the master for the injuries done by the servant in the course of their relation to each other. This liability does not in general extend to torts and injuries committed by the servant, unless from the presumed knowledge, assent, or neglect of the master; yet in many cases, such as setting fires to woodlands, or making bonfires in streets, &c., the statutes have made parents, masters, and guardians liable for the penalties prescribed.

SECTION II.—INJURIES TO PERSONAL PROPERTY.

Injuries to *personal* property or chattels, as distinct from *real* estate on the one hand and *things in action* on the other, are the subject of this section. No man is to deprive another of his property, or impair his right to it, or disturb him in the enjoyment of it; but must observe the rule, *so to use his own as not to injure another*.

The distinction between personal and real property is, perhaps, as well defined by the common law as it can be; and the line is not materially varied by our statutes. It is, in some cases, indistinct, but this arises, not from any indistinctness in the rules of law, but that the two kinds of property necessarily run into each other. Thus, fruit on a tree is not a subject of theft because it belongs to the realty, but if detached and laying on the ground it becomes personal property. This would, at first, seem to be a little fanciful and fastidious, yet it is very doubtful whether any other line of distinction could be invented that would not be, to say the least, equally the subject of criticism.

An *easement* in the lands of another is not personal estate, but a real franchise. But a lease for a term of years, however long the term, is personal estate.

Fixtures, such as iron stoves in a chimney, kettles set in brick work in a fulling mill, &c.—are part of the realty. But machines for carding wool, although placed in a building constructed for using them, yet not being so connected with it but that they may be removed and used in another similar building, are personal property.

It has been determined that a tenant lawfully in possession may take down and carry away a building erected on the premises by himself and with his own materials, and not so connected with the soil but that it may be removed without prejudice.

This conversion of even a dwelling-house into personal property, and entitling the owner to all the remedies for injuries done it incident to personal property, such as *trespass*, *trover*, and even a prosecution for *larceny*, exhibits sometimes an amusing incoherence in the language and principles of the law.

If the injury is from an act in the first instance unlawful, an action of trespass lies, although the act was not accompanied with *actual* force, as in every such case a force is *implied*. But where the injury is *in consequence* of an act which was in the first instance lawful, *trespass on the case* is the remedy. But so near do these cases run to each other, and especially so difficult is it to determine whether the act was from *design* or *carelessness*, that, by the act of 21st March, 1835, the distinction is abolished, and it is provided that the declaration in the writ shall be equally good in form, whether it be in trespass or trespass on the case.

The person in whom is the *general* property, although he may never have had actual possession, may maintain trespass; and this although the *special* property was in another, who had the possession when the act was committed. The person in possession having the special property only, may also have trespass.

Injuries to personal property may be—1st, by *force*; 2d, *misuse*; 3d, *negligence*.

I. The first embraces wrongful *taking*, *detention*, *destruction* and *mutation*.

For the wrongful taking or abduction and detention, the party has a two-fold remedy. First, by *replevin*, which restores the thing taken. But if the plaintiff prefers an equivalent in damages, or the property cannot be restored as it was, he must resort to his action of *trespass* or *trover*. Where the *detention* only constitutes the injury, the latter is the proper action, but a demand must precede the suit.

A recovery in damages, in either of these actions, to the full value of the property taken or detained, and satisfaction of the judgment, transfers the property to the trespasser or wrong doer.

In case of a destruction of the property, as by killing the plaintiff's horse, &c. damages, must, of course, be the only remedy; and where the act is wanton, willful and vindictive, these will be exemplary. In this case, indeed, the law classes it as a crime which it punishes by fine and imprisonment.

The case of *mutation*, or change of the nature of the property taken or detained, often presents nice and critical distinctions. The plaintiff is never *obliged* to reclaim his property, if deteriorated by the taking or detention of the defendant, but may resort to his action for damages.

But the owner has a right to his identical property, if he has a preference, provided its identity can be ascertained and it is not so changed in its nature and character as to make it altogether a different thing. The distinction attempted by the civilians, that the recaption can be allowed only where the article may be *re-converted into what it was*, must be rejected, as even a trifling mutilation would deprive a man of a favorite article, at very little trouble of the trespasser. Upon this hypothesis, unless boards could be reconverted into logs, or pork into hogs, the owner must, in most cases, rely upon the personal responsibility of the trespasser, for his compensation in damages. But there can be very little doubt that the owner may pursue his own property into whosoever hands he can find it, provided it is not so materially changed as to destroy or essentially impair its identity. If (to use familiar illustrations) the boards or timber are incorporated with other work or materials, and made into a dwelling-house, the owner would scarcely be allowed to rip them off. So, if lime-rock, detached from the quarry, should be taken and sold, the owner may pursue and take it. But if it be burnt into lime, it has become a different article, and even though he might identify it as the product of his material, it may be very doubtful whether he could re-take it in this manufactured state.

II. MISUSE.

The *misuser* of the property of another takes place while it is in the lawful possession of the wrong-doer. If one rides a horse immoderately, of which he has the possession by loan or hire, he is answerable to the owner in an action of trespass

on the case, for the consequential damages. So, if the horse is hired to go a certain distance, and the hirer rides him further or on a different route, he is answerable for any injury or accident, though he might have taken all necessary care. Indeed, wherever property is used in any way contrary to the terms or stipulations of the occupant, he is responsible for all damages.

III. NEGLIGENCE.

The exercise of a diligence and care equal to the magnitude of the trust, and according to the relative rights and interests of the respective parties, is a plain dictate of natural justice. If I place in the hands of another an article to be used for my exclusive benefit, I have a right to expect *some* care; if for our mutual benefit, *more*; and if for *his* exclusive benefit, *most of all*.

But the care is to be in some measure proportioned to the ability which I know the undertaker possesses. If I give a man labor to perform out of the usual course of his employment, and it is unskillfully performed, I ought to suffer the loss. If, however, he professes to be, in this respect, what he is not, and thereby I am deceived, it would seem that he ought to be responsible for *any*, even the slightest neglect, and for all mistakes.

Where the injury is done to personal property confided to the care of another, either for keeping, transportation or mutation, it is embraced under the general title of "BAILMENTS," and the usual remedy is by action of trespass on the case.

But there is another species of negligence where no special confidence is reposed, and which embraces a large class of cases. All injuries done to another's property by a careless or negligent management of your own—all acts done by servants or agents in the ordinary course of their employments, will fall under this specification.

The owner of a ship is responsible for the neglect, carelessness or want of skill of the master, and even for the embezzlement of the cargo by him or the mariners; but if the owner is not privy to the embezzlement, his responsibility is not to exceed his interest in the ship and the freight for the

voyage. There is an analogy in all the cases of responsibility for the conduct of servants and agents. Though this responsibility varies according to the magnitude of the trust and the confidence reposed, and the master of a ship, consequently, is held to a stricter fidelity than ordinary agents, yet there is one great principle which runs through all the cases, that what a man does by *another* is as much his own act as if he did it *himself*—and this extends as well to cases where the agency is *implied*, as where it is *expressed*.

If the master of a vessel, or the driver of a stage coach, by carelessness, injures the property of another, the owners in each case are liable for damages.

But in both cases, if the injury is by *design*, as a forcible running down another's vessel or another's coach, the owners are not liable.

And here it may be observed that the statute of 1835, confounding the actions of trespass and trespass on the case, makes no difference in the *liability* of owners for the acts of their agents.

SECTION III.—THINGS IN ACTION.

This class of cases embraces our more extensive and intimate relations. Men engaged in all the transactions necessary to sustain life and make it comfortable, must incur obligations towards each other; these obligations must be enforced, and if their performance is become impossible, an equivalent must be exacted and obtained, as a compensation for the failure. Hence the law of *contracts*, or “things in action.” A people enterprising as we are, and engaged in all the business of agriculture, commerce, and manufactures, comprehending the products of the forests and the fisheries, must combine and interchange their means and resources. They must substitute *promises* for funds in expectancy—they *must have credit*.

Contracts are usually distinguished into *express* and *implied*. *Express* where the parties agree by express terms, *spoken* or *written*—*implied* where, from the transaction, an undertaking is *presumed* or *inferred*.

The remedies for the non-fulfilment of these, are by actions of *debt*, *covenant*, or *assumpsit*.

I. **DEBT** was the usual remedy where the sum demanded was fixed and specific, but the plaintiff was obliged to prove his whole debt. This is no longer the case, as it is now the settled doctrine that he may recover less than the sum demanded in the writ. This is the usual suit on *bond* or other specialty with penalty, *judgments* of this and *other States*, and *penal statutes*. Where no mode of recovery is enacted, the action should be *debt*; and if there is a forfeiture of the penalty in case of bond &c., the court by its chancery powers or by a jury, find what is due in equity and render judgment accordingly. If the payments provided in the condition of the bond are to be made by instalments, or at successive periods, and a breach is found, execution will issue for the sums as they become due.

Judgments of other States of the Union, authenticated as is prescribed by the acts of Congress, have the same effect as in the State where rendered; and if the court had jurisdiction of the case and the defendant was notified, their merits are not permitted to be questioned. In these suits, interest is allowed from the time of rendition of the original judgment.

The defendant in the suit on a bond with condition, may *craveoyer*, that is, *to hear* the bond and condition read to him, which is usually granted, and thereupon he may demur or plead. Since the statute abolishing special pleadings, it may become a question *what is the general issue* in an action on a specialty, with penalty and conditions with covenants. *Non est factum*, a denial of the execution of the bond—*nil debet*, that he owes nothing—*omnia performavit*, general performance—or *non infregit conventiones*, that he has not broken his covenants—may all be general issues, according to the defence intended to be set up.

It would seem that in an action of debt on a judgment or decree of a court of another State or the United States, no other defence can be made but *want of notice, no jurisdiction, or a denial of the record*.

These judgments are not considered as foreign judgments, but so far as the courts have jurisdiction of the *parties* and the *cause*, they are conclusive.

II. COVENANT.

Covenant signifies an engagement entered into by which one person lays himself under an obligation to do something beneficial to another, or to abstain from an act which might be prejudicial to him.

Where the promise is by *deed* under seal, and for a valuable consideration, covenant is the proper action.

The remedy for the breach of such an engagement is by *action of covenant broken*, in which the injured party is to recover damages in proportion to the loss sustained.

But where the agreement is for doing something *in specie*, as conveying lands, executing deeds, &c., the most usual and indeed the most proper remedy is by *bill in equity*, whereby the court may decree specific performance—whereas at common law the party can only be repaired in damages.

No set form of words is necessary to create a covenant, if the intention of the parties can be fairly understood. Thus, a lease upon condition that the lessee shall leave the premises in as good repair as he found them, is a covenant on his part so to leave them.

Covenants are created by implication of law—as, where the lessor *grants* and *demises*, &c., these words import a covenant that the lessor has a good title.

The law presumes the covenant to be in the covenantor's own language, and upon this hypothesis the words, if of doubtful construction, are to be taken in that sense which is most strong against him and beneficial to the other party. But this rule is resorted to only where the intention of the parties cannot be otherwise determined by the terms of the contract.

Covenants are *real*, such as go with the freehold—or *personal*, such as affect the covenantor himself.

The covenants in our deeds usual in the conveyance of real estate, such as that the grantor or covenantor is lawfully seized, and that the premises conveyed are free of incumbrances, &c., are *covenants real*—yet if broken at all, it is at the instant they are made, and it would seem, therefore, that the executor or administrator, and not the heirs, should have the action for the damages. Executors and administrators are by our laws nothing more than trustees of the estate of the deceased, the former to administer it according to the will, and the latter according to the law, and for the benefit of creditors, widow, devisees, and heirs. Estates being subject to the payment of debts, and the residue to be distributed among the devisees or heirs, and in case of intestacy these last being entitled to an equal distribution, it would seem to be of little importance whether the damages recoverable for a breach of covenant in the conveyance of real estate were obtained by a suit by the executor or administrator, or by the heirs; as, in the one case, it must be held for distribution, and in the other paid over to these executors or administrators for the same object. Indeed, it would be well if the executor of a *testate* and the administrator of an *intestate* estate, might, *during the continuance of the trust*, prosecute instead of the heirs for all breaches of *covenants real*.

Suppose the estate to be insolvent, and the principal fund from which the creditors were to realize a dividend was a claim for breach of warranty in the sale of an estate to the deceased—this is a covenant which descends with the land, and yet the heir has no possible interest, as whatever he recovers must, as it would seem, be swept by the creditors.

Actions against executors and administrators are limited to four years; but there is a provision that if the covenant, contract, or agreement did not become due within the four years, the claimant may file his demand in the probate office, and the judge may direct the executor or administrator to retain assets to answer the claim, unless the heirs or devisees shall give security to refund.

And when any of these covenants &c. could not be enforced within the four years, the claimant, unless he shall have thus

filed his demand in the probate office, may, within one year after it shall have become due, enforce it against the heirs or devisees, if they are by law responsible or have assets.

Covenants under seal are presumed to have been discharged if no attempt has been made to enforce them within *twenty years*, but this is *presumption* of satisfaction only, and may be rebutted by other evidence.

Damages in a covenant of *seizin*, are the purchase money and interest, and the expenses, perhaps, incurred in defence of the *seizin*.

An assignee of a grantee in a deed of conveyance may maintain an action of covenant against the grantor or his heirs, on the covenants in the deed.

If the covenants which run with the land are broken *after* the assignment, the assignee alone may bring the suit.

In assigning breaches, the rule is, that in actions of covenant in deeds of conveyance, the breach may be assigned generally by negating the words of the covenant—as, that the grantor *was not lawfully seized*, &c. But when such assignment does not necessarily amount to a breach, as on the covenants against incumbrances and for quiet enjoyment, the breach must be specially assigned.

III. PROMISES.

A promise is in the nature of a verbal covenant, and wants nothing but the solemnity of writing and sealing to make it absolutely the same.

It must be made upon a *consideration*, good or valuable, or it is not binding even upon the party making it—that is, one must *do* or *give* that the other should be bound to do one or the other—there must be something for something—some benefit to the promisor as the foundation of his promise. But though the written contract may appear *naked*, without consideration, still the consideration may be proved by the testimony of witnesses. These promises, as well *written*, and not under seal, as *verbal*, are termed parole or simple contracts, and are either *express* or *implied*. But by the “statute of frauds,” to which we have before referred, *verbal* contracts or promises

are not binding—1st, where an executor or administrator promises to answer damages out of his own estate; 2d, where a man undertakes to answer for the debt, default, or miscarriage of another; 3d, where an agreement is made in consideration of marriage; 4th, where any contract or sale is made of lands, &c., or any interest therein; 5th, where the agreement is, in its terms, not to be performed within a year; 6th, where goods &c. are sold to the amount of thirty dollars, and no part delivered or earnest given to bind the bargain—and every parole promise is voidable also, unless demanded within six years after it became due, or if made by a person who, *at the time*, was legally incapacitated.

The subject of remedies for breach of simple or parole contracts, embraces most of the private transactions in society, and becomes extended and amplified as the wants, and pride, the invention, enterprise, and skill of man are increased and improved. Most of our commercial and maritime concerns, nearly all our manufacturing associations and engagements, and not a few of our transactions in real estate, are managed and carried on by simple or parole contracts, and for the breach or violation of these our courts of justice are chiefly occupied.

Suits upon *promissory notes* state the terms, the promise, consideration, and failure to pay. If in the name of an endorsee, the endorsements are alleged and the consideration, and the obligation to pay to the endorsee, or if payable to bearer the consideration must also be alleged. The plaintiff must prove the signatures of the maker and endorsers, whereupon a fair and valuable consideration is inferred, unless disproved by the defendant.

Bills of exchange are, after acceptance, analogous to promissory notes endorsed—the *drawee* to the *maker*, the *drawer* to the *endorser*, and the *payee* to the *endorsee*; and the suits on these are, as in the case of promissory notes, a plain narrative of the facts. Where the bill or note is not paid by the drawee in the one case, and the maker in the other, reasonable notice is to be given to the drawer of the one, and endorser of the other, in order to charge them.

Policies of insurance are contracts of indemnity against

perils. Marine insurance indemnifies against perils of the sea. The declaration in the writ must state substantially the contract or policy, and it is usual to insert it in terms. It must contain the warranties and stipulations, and the averment that the defendant had notice, and that, in consideration that the plaintiff had paid the premium and had promised to perform all things on his part to be done, the defendant promised to become an insurer for the sum subscribed and upon the terms mentioned in the policy, and that he would perform all things on his part as to that sum, and that he had subscribed the policy as an insurer. It must state that at the time of the insurance and loss, plaintiff was interested in the ship or goods insured to the amount of the policy (if valued, or if not) to the amount of the sum subscribed. It then states the voyage, when the ship was safe, and when and how she was lost, and brings the case within every warranty. The loss is particularly stated, and that it was within some peril insured against; and it then concludes with notice to the defendant of the loss and demand, and a breach of the contract for the non-payment of the subscription. A count for money had and received is usually added, to enable the plaintiff, if he is so entitled, to recover back his premium.

The plea of *non assumpsit*—that the defendant never promised—will answer every material allegation in the writ. When the *amount* only is in question, a tender may be pleaded, and when this is done after action commenced the money must be brought into court. It is scarcely necessary to add that every material allegation in the plaintiff's declaration must be proved.

Masters and owners of ships are liable for general charges against the ship, for repairs, and for seamen's wages.

The master may bind his owners to any contract for the benefit of the ship.

The repairer has his election for his pay upon the master or owners—they are generally liable, but *he* only on his contract. If the repairs are done *abroad*, the *ship* is liable; and it has been determined that where the repairs were done *at home*, and the repairer *had the ship still in custody*, he might hold her liable for the repairs.

Seamen's wages. Seamen may sue the master, the owner or the ship. But if the charterer hires the crew, and is to victual the ship, he, and not the owner, is liable. The underwriters are liable for seamen's wages *subsequent*, but not *antecedent* to the abandonment. But it is the right of seamen to which they almost invariably resort, as the safest and most expeditious process, to pursue the ship by a suit in the admiralty.

Though "freight is the mother of wages," yet the plaintiff is not bound to show that the ship earned freight—the defendant must prove the negative. Nor is freight always necessary to wages, as where a vessel goes out in search of a cargo, and returns empty. In suits for seamen's wages the master, if required, must produce the contract and log book, otherwise the seamen are permitted to state the contents, and proof to the contrary lies on the master.

Sickness or injury on the voyage which disables the seaman to perform duty, does not deprive him of his wages.

Seamen generally are witnesses for each other in suits for wages—even where the defence turns on the embezzlement of the cargo or other fraudulent misconduct.

These are some of the principal cases of *express* contracts by parole, but there are very many equally binding where there is no express stipulation, but where the law raises the presumption of an undertaking. These are termed *implied* contracts or promises. Of these we may mention such as are necessarily implied by the first principles of government to which every man is a contracting party. Whatever the laws order any one to pay becomes instantly a pre-contracted debt. As in cases of a forfeiture imposed by the by-laws of a corporation, and, indeed, of all penal statutes or enactments.

Others arise from natural reason and a just construction of law. These extend to all presumptive undertakings or *assumpsits*—as where I employ a man to transact business for me, or take goods of him, without in either case an agreed compensation, the law implies a promise to pay him for the service what he deserves, and for the goods what they are worth.

Where one has received money for the use of the owner,

without any valuable consideration—or money has been paid by mistake, or laid out and expended for another at his request—in all these cases justice requires that it should be repaid, and the law therefore *implies a promise*.

In close analogy to these cases is that of *an account stated* between merchants, where the law raises a promise that the person against whom the balance is found will pay it—and also that of an office of public trust, where an undertaking is presumed to perform the duties with fidelity and skill.

In case of sales with warranty, the seller undertakes that if the article is not according to the warrant, he will make compensation for the deficiency, although this last case is rather the construction of an *express* contract, than a legal implication. The above are instances where the law implies a promise, because equity and good conscience require a just compensation, and such as the parties to the transaction might reasonably intend.

CHAPTER SECOND.*

INJURIES TO REAL ESTATE.

SECTION I.—DISPOSSESSION OF THE FREEHOLD.

The title to real estate is in Maine so different from that in England, from whence we derive the common law in relation to it, that there is some danger lest, both in legislation and adjudication, we imagine an analogy where none exists. It has not unfrequently happened that our veneration for the common law, has induced us to apply it as a remedy for injuries to real estate, where, from the different character of our titles, it had very little or no application. This remark is not intended to depreciate, at all, the common law. It is, as a whole, a stupendous fabric of human wisdom—the work of ages, and of the wisest and best of men. Still, in attempting to adapt it to the condition and circumstances of a new and but partially cultivated country, we may be too much inclined to cling to principles and rules which only apply in a different state of society.

Our statutes of limitation have changed materially the law in regard to real actions. The right of entry by the mere act of the party is allowed at any time within twenty years next after his right or title first descended or accrued—and the right to sue or maintain an action on his own seizin is limited to the same time. If he enters, at any time within the twenty years, and his estate is a freehold at least, he may declare against the tenant in an ordinary writ of *disseizin*, and his remedy is plain and simple, and stripped of all technical discriminations.

* Chitty's Bl. Jackson on Real Actions. Const. and Laws of Maine. Bacon Abr. Decisions S. J. C. Maine.

Our statute speaks of formedons in *descender*, in *remainder*, and in *reverter*, and limits them to twenty years, next after the title or cause of action first descended. It is not recollected that either of these actions has ever been prosecuted in this State. The first is where tenant in tail aliens in fee, in tail or for the life of another, or when he is disseized. In this case, the heir after his death may recover the estate. The second is where the gift is to one in tail, remainder to another in tail or fee, or to one for life, remainder to another in tail, and after the termination of the first estate, the remainder man or his heir is *deforced*. In this case, he may have his formedon in *descender*. The last is where lands are given in tail and the donee or his heirs dies without issue. In this case, the donor may recover the lands by his *formedon in reverter*.

In the *first* case, if the tenant in tail aliens in fee or is disseized, it is not readily perceived why his heir may not enter, and upon such entry institute his writ of disseizin. In the *second*, where the remainder man is *himself deforced*, he might, no doubt, re-enter and maintain his *disseizin* under his title. And in the *last* case, the donor or his heir to whom the estate in tail reverts in default of heirs, might well enter within twenty years and maintain the same kind of action.

But whether this be so or not, certain it is that these *formedons* are almost if not quite obsolete, and the simple writ of entry on disseizin is a complete remedy in all cases where the disseizin has not exceeded twenty years.

If the person entitled to either of the writs of formedon, or to make any entry into lands &c., shall be an infant, feme covert, non compos, absent beyond sea or out of the United States at the time the right or title accrued, the right of suit or entry is extended *ten years* beyond the *twenty*.

It is not improbable that, on a revision of our statutes, the process in real actions will be further simplified, and the same proceedings made applicable to all suits for the recovery of lands or other real estate.

An action upon *the possession* of the ancestor, may be instituted within twenty-five years—that is, the possession or seizin

of the ancestor must be proved to have been within twenty-five years from *the teste of the writ*. This action may be maintained though the *property* were not in the ancestor. If he had obtained judgment in a possessory action and thereupon a writ of possession had been executed, his heir might maintain this suit, though the *right of property* were in another. The plea must traverse the possession of the ancestor, and upon this issue the cause is tried. These suits, however, are seldom prosecuted, as the writ of right on the seizin of the ancestor is a simpler and safer process. This may be maintained at any time within thirty years between the ancestor's seizin and the teste of the writ. In this process we have no jury of *sixteen*—no “knights girt with swords”—but proceed in a very plain way; the declaration contained in the writ, (the form of which is prescribed by the statute,) states the ancestor's seizin, and counts mediately or immediately from him to the demandant. The tenant, who must be tenant of the freehold at least, may plead the *mere right*, viz. that he has more right to hold than the demandant has to recover, in which case he admits the seizin of the ancestor and takes the affirmative and the opening and close of the case; or, which is the safest and best, the tenant may couple his plea of mere right with a *traverse of the seizin*, and put the proof upon the demandant—in which case *the demandant* will have the opening and close of the cause.

The demandant may also maintain his writ of right *on his own seizin*, but must count upon it within twenty years from the teste of the writ—and the plea should be on the mere right, with a traverse of the seizin.

These writs of *disseizin* and *right* thus simplified, together with the right of entry, have made the practice in real actions so plain, that members of the profession meet with few cases indeed, where resort must be had to any of the other forms required by the common law. In the cases of *abatement*, where the entry is on a vacant possession after the death of the ancestor and before the entry of the heir—*intrusion*, where the entry is after the termination of an estate for life and before the entry of him in remainder; or, in cases where tenants for

life, alien in fee, in tail or for life, an entry and thereupon a writ of disseizin or a writ of right is the ordinary remedy. And in other cases, such as where an estate is alienated by the person, who labors under some incapacity, as infancy, coverture, &c., such person may, after the disability is removed, *enter*, instead of resorting to the different remedies provided at common law.

The writ of *ejectment*, with its fictions of *lease*, *entry*, and *ouster*, is seldom brought against tenant of the freehold, as that of *disseizin* is conclusive of the right of possession, at least, and in most cases settles *the title*.

But where an entry is barred, the demandant cannot count upon his own seizin, and must resort to his ancestral writ, in which he may rely upon the *possession* of his ancestor within *twenty-five*, and on his *seizin* within *thirty* years.

In the writ of entry on disseizin the demandant calls the tenant to answer in a plea of land, wherein he demands against him a tract of land &c., situated &c., bounded &c., of which the tenant unjustly and without judgment disseized him within twenty years. Whereupon the demandant says that within twenty years he was seized &c. in his demesne as of fee, taking the profits to the annual value of —, and of which — the tenant disseized him—To the damage, &c.

The general issue is that the tenant *did not disseize*.

In the writ of right the demandant alleges his own seizin or that of his ancestor *as of fee and right*, and claims the estate as his right and inheritance. In other respects it is substantially as in a writ of entry on disseizin, save that, if it counts on the seizin of the ancestor, that seizin may be alleged within *thirty* years.

Tenants in common and joint tenants may sever in their suits, and bring their actions for their respective shares; and in case a demandant shall die, or being a *feme sole*, shall intermarry pending the suit, the writ shall not abate, but may be amended accordingly.

A *view* of the premises demanded may be granted by the court. This is, however, matter of discretion, and when

granted it is after the jury is empaneled and in cases of disputed monuments, lines, or boundaries, to enable the jury better to understand the evidence.

As the writ of right or entry on disseizin will lie only against tenant of the freehold at least, the tenant may plead in abatement or bar, a *general* non-tenure, or if his tenancy be inferior to a freehold a *special* non-tenure, that he does not hold or possess the premises but as tenant for years or at will.

A *disclaimer* may be also general or special, and the effect is nearly the same as that of non-tenure, except that a general disclaimer is an estoppel against *all reversions and remainders*.

The replication to pleas of non-tenure and disclaimer, is that the defendant *is tenant of the freehold*. Where the estate demanded is less than a freehold, the ordinary process is a writ of ejectment, where the *lease, entry, and ouster* is supposed to be confessed or dispensed with.

The form of the writ of dower is prescribed by the statute, and varies very little from an original summons, and it may be against the heir or tenant of the freehold. The demand must have been made one month previous to the suit. The want of a demand, it would seem, may be pleaded in abatement or in bar. How the statute requiring the general issue can affect a suit in dower where there *is no such issue*, it is difficult to say.

Besides the want of a demand just alluded to, there are the following points of defence, each of which must be specially pleaded—1st, A denial of the marriage—2d, of the seizin of the husband—3d, of his death—4th, that the wife during the coverture released her right of dower by joining her husband in a conveyance of the premises—and 5th, that the dower has been assigned by a decree of the Judge of Probate. If the defendant would rely upon more than one of these he must do it by leave of the court to plead double. The last, probably, could not be pleaded with either of the others.

SECTION II. — TRESPASS.

Trespass “for breaking and entering the plaintiff’s close,” can only be brought by the person who has the possession *in fact*, a general property not being, as in case of personal property, a sufficient foundation for the action.

Every unwarrantable entry on another’s soil, the law entitles a trespass *for breaking and entering his close*. The common law considered every man’s land enclosed either by a visible and material fence, or by an ideal boundary; and every entry upon such close of another without consent, carried necessarily along with it some damage, as, at least, the treading down and bruising the herbage. And for this entry upon the lands of another, a man is answerable not only for his own trespass but that of his cattle. Whether this principle of the common law is applicable in its full extent to the uncultivated lands of this State, even where the statutes have not modified it, admits of some doubt. There are tracts of wood and timber-land, and lands where there is *neither wood or timber*, nor even *herbage*, unenclosed by any visible or material fence, on which an entry would do no injury. And when lands are covered with snow at the depth of two or three feet, it is not easily perceived that there could be any “treading down and bruising the herbage.” In these and similar cases, however, a consent would probably be presumed. But so careful is the law of a man’s possession of his freehold, that should he, even in these cases, *forbid* an entry, trespass would lie, however trifling the damages might be.

At a very early period of our settlements, just and equitable laws were enacted in regard to fences of adjoining occupants of lands, which have been revised and improved from time to time, and now constitute well defined rules upon the subject. They provide that adjoining owners or occupants of lands shall contribute equally in building and repairing the fences. To

this end, the towns at their annual meetings are to choose two or more *fence viewers*, whose duty it shall be to determine disputes of adjoining occupants in regard to division fences.

All fences four feet high and in good repair, whether of rails, boards, timber, or stone walls, and such other things as in the opinion of the fence viewers would be equivalent, as brooks, rivers, &c., are to be considered legal and sufficient. If any owner or occupant refuses to do his proportion, the other party may obtain the opinion of the fence viewers, which is to be given in writing and served on the delinquent, with directions to build or repair *within six days*. And in case of failure, the complainant may himself build or repair the fence; and when he shall have made it sufficient, in the judgment of the fence viewers, and the value shall have been by them ascertained, he may, after one month, sue for and recover of the delinquent party double the amount. Where a stream divides the possessions, and the fence must stand on one bank or the other, these officers may be called in to decide, and the same proceedings are to be had in case of neglect to comply with their determination. When one party shall lay his close open, he is not to remove the division fences, if the other will pay what the fence viewers shall adjudge; and when any one may choose to enclose what before laid open, he shall pay for half the fence of whomsoever he may adjoin. Fences running into water are to be built and maintained in equal halves, with the same process for delinquency.

The proprietors of *common and general fields* are *quasi* corporations, and the rules in regard to their fences are specially prescribed—but this is a kind of tenure very uncommon in Maine, and the regulations in regard to it are of little interest.

Every owner and occupant of the soil is carefully protected in the enjoyment of it, and in all controversies in regard to his title he has the right to a trial by a jury of the vicinage. Justices of the peace, as has been before observed, have original jurisdiction in civil actions where the damages shall not exceed twenty dollars. But though this jurisdiction is not final, they are not permitted to decide, even in the first instance, where

the title to real estate is brought in question by the defendant's plea. Whenever, in an action of trespass, say for breaking and entering the plaintiff's close, or in any other action, the title is thus brought in question, there is an end of the justices' jurisdiction, except to take the defendant's recognizance and send the case to the State District Court.

There are certain trespasses punishable by statute as public offences, in addition to the right of action for damages to the party injured—such as cutting and destroying trees growing for shade or ornament, or timber, wood, or under-wood—throwing down or opening and leaving open bars, gates, or fences—injuring fences—digging up and carrying away soil, &c., or roots, plants, or fruits—cutting and carrying away grass, corn, &c., taking goods, &c. from a wharf or landing place—breaking glass in any building—these and other such are cases of malicious mischief, when done without right or consent of the owner.

It is also provided that if any person holding lands *in common and undivided*, shall take the timber, &c. or commit any waste, without giving forty days' notice, setting forth that he has occasion to enter and improve, or shall commit any waste pending a process of partition, he shall be liable in trespass for treble damages—one half to the use of the tenant prosecuting, and the other to the other co-tenants, exclusive of the trespasser. The same action is given and the same penalty against any person making strip or waste pending any real action.

There are cases, however, where one may enter upon the lands or into the dwelling-house of another without being liable in trespass. If the tree or fruit of one fall upon the land of another, the owner may enter and take it away. And generally whenever the animals or other property of one, are found upon the close of another, without the fault of the owner, he may enter and take them away, taking care to do no other damage than is necessary to the accomplishment of the object. Analogous to this is the right of an officer to break and enter a dwelling-house to arrest the person or attach the goods, intended to be protected by the lawful occupant. Though his

house is his castle, which no officer has a right to enter to execute civil process against the tenant himself, still, if he will attempt to screen a stranger in his person or goods, even his dwelling-house loses its character of a sanctuary. Nor does this inviolability of a dwelling-house extend to the protection of even the tenant, from arrest on a charge of a criminal offence. And an officer may by virtue of a writ of seizin or possession break a *dwelling-house* to execute it against the tenant, as by the judgment it ceases to be *his*. But in all of these cases, the officer before he can be permitted to break and enter; must state the cause of his coming and demand the opening the doors.

The pleadings in trespass are simple. The writ must allege that the trespass was with force and arms and against the peace—it may state a close generally, if it be in the county without defining it, and leave it to the defendant to allege the place where, &c. in his plea, and if he makes a wrong location, the plaintiff may *assign* and define his close in his replication. If the only issue is upon the title pleaded by the defendant, he shall open and close. The *fee simple* being put in issue in this action of trespass and verdict and judgment thereon, it is conclusive between the parties and those who come in, in privity of estate, *even against a writ of right*. In case of a recovery by the plaintiff upon the title, as where boundaries are in controversy, &c. no writ for possession goes, but the judgment determines the case and puts the plaintiff in full possession.

SECTION III.—NUISANCE.

Nuisance (annoyance) is any thing that works hurt, inconvenience, or damage.

Nuisances are *public* such as obstructions to highways and bridges, or *private* as whatever injures or annoys the lands, &c. of another.

To obstruct ancient lights—to build so near another as to throw the water of the roof upon his buildings or possessions

—to erect smelting houses so near the lands of another as that the vapor shall injure his grass or cattle—are nuisances for which the party injured has his remedy by *action of trespass on the case*. The same remedy is given for diverting the water that used to run to a mill—for corrupting or poisoning water, by erecting dye-houses or lime-pits, or in short, to do any act that in its consequences must necessarily tend to the prejudice of one's neighbor.

A like remedy is given for injuries to *incorporeal hereditaments*. If I have a right of way over another's lands and he obstructs it, or if I have an ancient ferry and a new one is created which draws away my custom, I have the same remedy for my damage.

And though a second action will not lie for the *erection* of a nuisance, the *continuance* is a new injury for which actions may be maintained and repeated until the nuisance is removed. The flowing of another's land for the use of mills erected on one's own privilege, is an exception, however, as the statutes for the encouragement of mill owners have prescribed rules for estimating damages and enforcing the payment.

Certain noxious trades, such as killing creatures for meat, distilling spirits, trying tallow or oil, currying leather, &c., may become nuisances, and to prevent them *places for carrying them on* may be assigned, and in case they are established contrary to such assignment the remedy is by penalty and abatement—and the party injured is moreover entitled to his damages “in a special action on the case.”

When the nuisance is *public*, such as the obstruction of a highway, any person may prostrate or abate it; and for this purpose he may, if necessary, enter upon the land of the party erecting or continuing it, doing as little damage as possible to the soil or buildings.

SECTION IV.—WASTE.

The word *waste* carries with it its own definition, and when applied to real estate is the spoiling and destruction of it by

demolishing not only the temporary profits but the very substance of the thing. Any man may, however, destroy *his own fee simple*, provided this destruction shall not endanger his neighbor. He might with impunity, perhaps, burn his own house, where no one else might be exposed in his person or property. But where the estate is limited, as for life or years, if the tenant commits waste, it is a manifest injury to him who has the inheritance.

If tenant for life shall by neglect or wantonness occasion any permanent waste to the substance of the estate, whether the waste be voluntary or permissive, he is liable in a suit by the person entitled to the immediate estate of inheritance, to answer in damages, as well as to have his future operations stayed.

The usual remedy is by an action of trespass on the case in the nature of waste. But to *stay operations* a process in chancery is necessary.

But in cases of waste by tenants in common against their co-tenants, or by defendants in partition, or other real actions, pending the suits against them, the statutes have given remedies *in trespass*, as will be seen in the second section of this chapter. These provisions, however, may be *cumulative* only, and the action on the case for waste not be affected by them.

The writ of waste, which recovers the place wasted and treble damages, has been seldom if ever resorted to in Maine. This action is founded on the statute of Gloucester, and the better opinion is that it was brought by our ancestors here as a part of the "common law." The remedies in trespass, and *treble damages* as given by our statutes in cases of waste by tenants in common, and pending real actions, seem to have been borrowed from the statute of Gloucester.

In the writ of waste, the declaration must set forth the plaintiff's title, and fully and correctly show how he is entitled to the inheritance. He must specify the quality and quantity of the waste, and the place where it was committed—whether it was in the whole or part only of the premises—whether it was done *sparsim*, here and there, or was in its nature total, as by prostrating a whole building—and he may recover for as much as he proves, though not the whole.

The general issue *denies the waste*—that “he did not make any waste, sale, or destruction in the messuage aforesaid,” &c. This *generally* puts the whole title of the plaintiff in issue; but if the defendant has matter of justification or excuse, as that he cut the wood &c. for fuel, he must plead it, or under our late statute put it in his brief statement. If the term of the tenant had expired before the action was commenced, or expires pending the suit, the recovery will be of course for the treble damages only.

But the action of trespass provided by our statutes in the cases referred to, and the action on the case in the nature of waste and the right to apply to the chancery side of our courts for injunctions to stay waste, have almost if not entirely made obsolete this action for the recovery of the place wasted and treble damages. It is, indeed, quite certain that such an action could not now be sustained.

PART III.*

CRIMES AND PUNISHMENTS.

WHERE the rights of society are invaded by the commission of violence, or by the atrocious violation of a public law, it is a crime, or misdemeanor.

There is no line of distinction between crimes, offences, and misdemeanors. The Constitution of Maine speaks of capital *crimes*, and of capital *offences*—and that of the United States prescribes *impeachment* for “treason, bribery, or *other high crimes and misdemeanors*.” By the common law, all indictable offences, not amounting to *felony*, were misdemeanors. But with us, and our indefinite meaning of the word “felony,” such a definition would be utterly unintelligible.

In every civilized community the object of punishment should be *the prevention of crime*. Nothing can justify the infliction of punishment *in revenge*. It is true that, in many instances, punishments are *retaliatory*, and the retaliation seems to be suitable; and, no doubt, in proper cases, retorting the injury done or attempted, upon the perpetrator, accords with our sense of justice.

Punishments ought not to be always in proportion to the atrocity of the crime. The criminal law should prescribe punishment with regard to *the crime, the inducement to its com-*

* Chitty's Bl. Const. and Laws U. S. and Maine. Russell on Crimes. Chitty's Crim. Law. Ed. Enc.—title Law.

mission, and the *difficulty of conviction*. Still, the considerations of temptation and facility of escape, should never prompt us to inflict severe punishments for small or trifling offences.

Crimes are prevented by depriving the perpetrator of the power of repetition, and making his punishment an example to others. Without one or both of these objects nothing could justify the infliction of punishment.

Corporal punishments are, except in the Army and Navy, and a few other cases, limited to two kinds—*death* and *imprisonment*.

Punishments should not only be equal and adapted to the condition and habits of the people, but, as a general rule, they should be *sure*, lest the guilty should expect to escape, and *prompt*, lest the crime should be lost sight of or forgotten, and a morbid sympathy should prevail at the expense of the public safety. Yet this certainty and promptitude should not be so indispensable as that the power of pardon might not be interposed in proper cases.

But punishments are prescribed in vain if the pardoning power becomes a common affair, or is perverted to purposes of favoritism. A truly great man has remarked that “if we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments.” In a republic, especially, punishment not only should be moderate and well defined, but *sure*—and the heaviest part should be the infamy attending it.

All persons are capable of committing crimes unless there be a defect of the will. But there must be both a vicious will and a vicious purpose, and such purpose, or *overt act*, demonstrated by some evident premeditation. Idiots, infants under the age of discretion, and persons of non-sane memory, are incapable of committing crimes; these last cannot be *tried* for what is done in a period of sanity; and if, after conviction, a person becomes mad, judgment cannot be pronounced until his reason is restored. Drunkenness, however, is a voluntary madness, and instead of an excuse, is an aggravation of the offence.

A *principal* in a crime is he who commits the fact, or is present at, aiding, or in any way maliciously abetting the commission.

An *accessary* is he who does not commit the fact, nor is present at the commission, but is in some sort concerned therein either before or after.

An accessary *before* the fact is one who, being absent when the crime is committed, has procured, counselled, or commanded another to commit it.

An accessary *after* the fact is where a person, knowing the crime to have been committed, receives, relieves, comforts, or assists the offender with the means of escape, to the hindrance of public justice.

It is a rule of the common law, that he who commands another to commit an unlawful act, is accessory to all that ensues upon that unlawful act. As, if A commands B to beat C, and he beats him so that he dies, A is an accessary before the fact to the murder. But this would only be the case where the command was to beat *violently*.

To constitute an accessary *after* the fact, the knowledge of the crime must be proved—an *implied* notice would not be sufficient. The crime, too, must be complete—assistance to the murderer *after* the wound is inflicted and before the death, would not constitute an accessary to the murder.

By the statutes of Maine, accessaries before the fact are, in most cases, subject to the same punishments as the principal offenders.

CHAPTER FIRST.*

CRIMES AND OFFENCES AGAINST RELIGION AND MORALITY.

We have no national or state religion—no established church. Every man, provided he does not disturb others in their religious worship, is not to be molested or restrained in his own. In this his conscience is his guide—and whether it is a good conscience, is exclusively an affair between him and his God.

Yet the *Christian* is the professed religion of nearly the whole people. The belief in God and the revelation of his will as contained in the Holy Scriptures is general, and public worship and the institution of the Sabbath are regarded as essential to our present and future happiness. And while we accord to every one the enjoyment of his own religious belief, and even *unbelief*, the laws protect our religion and worship from profanation.

There are offences, too, whose tendency is to impair and corrupt the public morals and induce a disregard to virtue and chastity, and thus subvert the very foundations of civil society. Justice can never be maintained nor liberty preserved, if chastity and temperance are disregarded. Let lewdness and licentiousness be associated with impiety, and their mutual aid would very soon destroy the best government on earth. While we should guard our liberty with a vigilant eye, we should take care that it does not degenerate into that licentiousness which ends in despotism. Crimes which sap the foundation of the freest government have been perpetrated in the name of liberty.

* Stat. Maine and U. S. Chitty's Bl.

SECTION I. — BLASPHEMY.

This consists in denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world—or by cursing or reproaching Jesus Christ or the Holy Ghost—or by cursing or contumeliously reproaching the holy word of God, as contained in the canonical Scriptures.

Whatever may be a man's religious belief, however much of an infidel he may become, he can have no apology for cursing or reviling what others hold most sacred. And if any man can be so infatuated as to reject every thing respecting God and religion, it is no part of his civil rights to curse or reproach either.

The prosecution for this offence is by indictment, and the punishment confinement to hard labor for a term not exceeding five years.

SECTION II. — PROFANENESS.

If there is any one crime more than another which is without excuse or apology, it is profane cursing and swearing. It is *without temptation*, and its tendency is a total irreverence for the Supreme Being, and disregard of the solemnity of an oath when administered in the course of justice. It is one of the crimes in the decalogue, and the guilt of taking the name of God in vain is clearly indicated as of a high and aggravated character. Our laws, however, whether from the frequency of the crime or from a habitual indulgence in it among legislators themselves, or from whatever cause, have prescribed for its commission very light and inadequate punishments.

Prosecutions may be instituted before justices of the peace. For the *first offence*, the punishment is a fine of not less than

one nor more than two dollars—for the *second, double*—and for every subsequent offence, *treble*—one moiety to the use of the town and the other to the complainant; but the prosecution must be within twenty days after the offence.

SECTION III. — SABBATH BREACH.

The Sabbath is invaluable, merely as a *civil* institution. To be relieved from care and labor, at least one seventh of the time, has been found essential to the health and comfort of man. Indeed, the brutes which he uses become more valuable by this portion of rest. Experience has proved, beyond doubt, that the suspension of all labor for one seventh of the time, is an actual, ultimate gain.

But instead of a gain, it would be an incalculable loss if this seventh of the time were spent in amusements and dissipation. It is a precept of the decalogue that we remember the Sabbath day to *keep it holy*.

The Christian Sabbath is on the *first* day of the week, and is substituted for the Jewish Sabbath, which was the *last*. This substitution is nowhere prescribed in Scripture, but has been adopted from the fact that it is the day of the resurrection of Christ, the great author of the Christian faith.

The statute of Maine for the due observance of the Sabbath, limits the time to the period between the midnight preceding to the sun-setting of the day. This was done for the sake of the consciences of those who differ as to the *beginning* and consequently the *ending* of the Sabbath, and proves that our ancestors, who prescribed the rule, were actuated by the principle that “the Sabbath is made for man, and not man for the Sabbath.”

No traveller, drover, wagoner, teamster, or any of their servants, are allowed to travel on any part of the Sabbath, as thus defined, on penalty of not less than four dollars nor more than six dollars and two thirds, *except from necessity or charity*.

This must be understood not to be merely a *physical* necessity, but a *moral* fitness or propriety. Thus, one may travel to execute a lawful contract, as to carry the United States mail, the Postmaster General having power under the laws of the United States to make the contract. But this does not protect the travellers in the mail-coach, nor even the carrier in driving about town to collect or distribute his passengers.

Officers charged with the execution of the law are not authorized to *stop* travellers on the Sabbath, on account of such travelling merely—the statute not authorizing previous restraint, but subsequent punishment. And any unnecessary official labor by such officers, will render *them* liable to the penalties of the statute, although their doings may not be void.

Persons are forbidden to keep open their shops, ware-houses, or work-houses, to do any labor or business (necessity or charity excepted), to be present at any concert of music, dancing, public diversion, show, or entertainment, or to use any sport, game, play, or recreation—under the same penalties as are prescribed against travellers.

Innholders, or keepers of houses of entertainment, suffering persons (not travellers, strangers, or lodgers,) to abide in their houses or appendages, spending their time idly, or at play, or doing secular business, are liable to a penalty of three dollars and a third for each person—for a second conviction, *double*—and for a third, a forfeiture of their license; and the person so *suffered* to abide is to pay a fine of not less than *two* nor more than *four* dollars.

For rude or indecent behavior in any house of public worship on the Sabbath, the penalty is not less than one nor more than seven dollars; and for interrupting public worship *any where*, or at *any time*, the fine is not less than three nor more than thirty-three dollars.

All persons are forbidden to be present at any concert of music, dancing, or other public diversion, or to use any game, sport, or recreation on the evening preceding or succeeding the Sabbath, on penalty of three dollars and a third, and innholders &c. are forbidden to entertain or suffer to remain or be

in their houses, &c., any persons drinking or spending their time on these evenings, (travellers, strangers, or lodgers excepted,) on penalty of three dollars.

Sheriffs, constables, and grand jurors are enjoined to execute the law, and *tithingmen** are specially empowered to enter licensed houses to examine and to enquire of travellers the cause of their travelling, and penalties are prescribed for resisting or evading the examinations and enquiries; and these penalties, together with those for rude and indecent behavior and disturbance of public worship, are to be recovered for the use of the State. All penalties of more than seven dollars, or where the defendant lives out of the county, are recoverable by indictment—and others for less than that sum by complaint before a justice of the peace.

SECTION IV.—LEWDNESS.

Though in England cases of incontinence were cognizable in the spiritual courts, open and gross lewdness, either by frequenting houses of ill fame or by grossly scandalous or public indecency, were punishable at common law.

By the statutes of Maine, it is provided that if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, he or she shall, on conviction, be punished by confinement to hard labor for a term not exceeding five years.

Fornication is punishable by commitment to the county gaol for a term not less than ten nor more than twenty days, or by fine of not less than twenty nor more than one hundred dollars.

* Tythingman, or tithingman, formerly a church officer and collector of tithes—now the office consists in preventing *sabbath breach* and disturbances in public worship.

Persons marrying and continuing to live together, a former wife or husband being alive, are subject to confinement to hard labor not exceeding five years. But the penalty does not attach where the former wife or husband has been absent beyond sea for seven years and not known to be alive—nor to a wife whose husband willingly absents himself seven years without in the meantime making suitable provision for her support and maintenance, if in his power—nor to a case of *divorce*, unless the person be the guilty cause—nor to the case of a marriage *within the age of consent*.

The *cohabiting together* prohibited by the statutes must be understood a dwelling or living together, and not a single act of criminal intercourse; and evidence of secret or private lewdness or lascivious behavior will not support an indictment for open and gross lewdness and lascivious behavior.

SECTION V.—DRUNKENNESS.

The vice of all others the most difficult to correct, and at the same time the most pernicious to society, as it draws after it a train of the most distressing and destructive evils, is *intemperance* in the use of distilled and fermented liquors. The laws of the United States lay an impost upon the importation of ardent spirits as heavy as the article will bear, inasmuch as a higher tax would induce smuggling, and instead of restraining, encourage the consumption. From the early settlement of the country, *license laws* have been in force, *regulating* the sale of intoxicating liquors, in order to *restrain* what could not be *prevented*. The laws now in force provide, under a penalty, that no person shall *presume to be* a common victualler, innholder, or seller of wine, beer, ale, cider, brandy, rum, or any strong liquors, by retail, or in a less quantity than twenty-eight gallons at a time; and that no person shall *sell* any spirituous or mixed liquors a part of which is spirituous, without a license in either case.

The mode of granting licenses is particularly prescribed, inn-holders and retailers are restrained and regulated; they are forbidden to keep implements or facilities for gaming in their houses or dependencies, or to suffer riot, disturbance or excessive drinking. Selectmen of towns are to deliver lists of common tipplers to the persons thus licensed, and thereupon they are prohibited to furnish them with intoxicating liquors. And the selectmen may prohibit the sale for one year, and from year to year, to such idlers or excessive drinkers as so waste their time or estate as to injure their health, or expose their families to poverty or the town to their maintenance; and persons thus prohibited are not to be furnished with these liquors by others.

Different penalties are prescribed for a violation of these prohibitions, and actions or presentments for the recovery of the penalties and execution of the laws are provided.

Persons who, by excessive drinking, gaming, idleness or debauchery, (and these are kindred vices) waste their estates and expose themselves and families to poverty, are disqualified to manage their affairs, and placed under guardianship, as minors or idiots.

Such are, briefly, the measures to prevent, or rather to *check* this moral evil, which carries desolation and ruin in its wake. Whether any other, and if any, what legislation would be prudent or expedient, are questions of great moment and solicitude, and upon the decision of which the happiness or misery of thousands depends. Certain it is that most of the crimes that infest society are traced to intemperance as the remote, proximate or immediate cause, and public opinion is vigilant in seeking for a remedy.

To *repeal* the license laws altogether, as some propose, would be a general license for any to sell and for all to purchase. To *prohibit* the sale, while the laws of the United States permit the importation, is, it is feared, impracticable. *Regulation of the sale and use*, combined with *moral influence*, is, perhaps, the only remedy that can be, *at present*, prescribed.

SECTION VI. — GAMING.

The passion for gaming is almost universal. Whether from a hope to obtain property without the tedious process of industry, or from the excitement caused by the *uncertainty*, or from whatever cause or causes, there is an infatuation in gaming bordering on insanity.

It is in vain that the doctrine of chances is become a mathematical science, and that the probabilities of gain or loss in dice, cards or lotteries are demonstrated with such appalling truths to the prospects of the gamester—yet men play on, and often put their all upon *the hazard of a die*, and not satisfied with one ruin, they revive and try it again. When men are thus intoxicated, penalties will be of little avail, as a false sense of honor will deter them from appealing to the laws.

All notes, bills, bonds, judgments, mortgages, or other securities or conveyances, where the consideration is in whole or in part for any thing won by gaming, or for betting on the game, or for any thing knowingly lent or advanced for gaming or betting, or to any person gaming or betting, are *ipso facto* void.

All conveyances of real estate made for such considerations inure as if the person making them were dead.

Persons losing by playing or betting, may recover back the money or property lost, and if the loser does not prosecute within three months, and without collusion, any other person may sue for and recover it, one half to his own use, and the other to the use of the town.

Persons winning by gaming or betting to the value of three dollars at one sitting, and receiving the same, forfeit double the value, to the use of the poor of the town.

In suits for the recovery back of money or other property thus lost, the plaintiff may elect to tender his oath of the fact, and this shall avail him, unless the defendant will on oath deny it.

Persons playing at these *licensed houses* or their appendages, or exposing implements of gaming, or sitting at table with such implements, are subjected to a penalty of from one to ten dollars, to be recovered by complaint before a justice of the peace, or upon indictment at the State District Court.

SECTION VII.—EXHUMATION.

This is the disinterring of a corpse. To invade the sepulchres and disturb the ashes of the dead, is a crime against the most sacred feelings of the community. Besides the pain inflicted upon friends and relatives, it excites a public sympathy, carrying with it a strong tendency to riot, disorder, and breach of the peace.

Still, there are cases where exhumation, for the benefit of science, might be tolerated. The laws of the United States authorize the delivery over of the body of a criminal executed for murder, for purposes of dissection, and inflict a punishment upon any who may rescue the body or attempt to do it.

In case of murder *in a duel*, the Supreme Judicial Court of the State *shall*, and in other cases of murder *may*, in addition to the sentence of death, further sentence that the body shall be delivered over to a professor of anatomy and surgery, or to a surgeon, to be *dissected*.

The board of health or selectmen of any town may authorize exhumation. But any person without such authority who shall knowingly and wilfully dig up, remove, or carry away any human body, or the remains thereof, or aid in doing it, shall, on conviction, be punished by imprisonment not exceeding a year, or fine not exceeding one thousand dollars. And whoever receives, conceals, or disposes of such body or remains, is subject to the same punishment as the principal offender—and the pecuniary forfeitures accrue half to the informer and half to the State. But the statute contains a proviso that nothing therein shall affect the authority of the courts of the United

States or State, or any person acting under them, in removing or disposing of the bodies of persons executed pursuant to their sentences respectively.

Attachment or arrest of a dead body on civil process is prohibited by a statute of the State, under a penalty of fine and imprisonment—however extraordinary it may seem that such a prohibition should be necessary.

SECTION VIII. — ADULTERY.

This is a violation of the marriage bed, and is committed by an unlawful sexual intercourse where *either party* is married. In England the temporal courts take no cognizance of this offence, otherwise than as a private injury. By the statute of Maine the punishment is imprisonment and hard labor for a term not exceeding five years.

The class of crimes in this chapter against religion and morality is within the exclusive cognizance of the State. Such is the diversity of manners and customs in the several States, and so different is their standard of piety and morality, that no general law could be framed to suit the condition of all. The regulations in regard to these are therefore left to the local governments, which can adapt the laws and graduate the punishments according to the danger of commission and power of prevention.

Congress, however, has the power of exclusive legislation over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; but until the act of the 3d March, 1825, no provision had been made to define and punish the crimes and offences contained in this chapter, and many others, and it was questionable whether

this power of *exclusive* legislation had left any concurrent jurisdiction in the State, even though reserved in the act of cession.

To guard against such an impunity, that act has provided that any offence committed in the places thus ceded, the punishment of which is not specially provided for in any law of the United States, shall be punished in the same manner as in the State where the ceded place is, in which the offence was committed.

CHAPTER SECOND.*

CRIMES AGAINST SOVEREIGNTY.

It is a remark of Montesquieu, that “the severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or a republic, whose spring is honor and virtue. In moderate governments the love of one’s country, shame, and fear of blame, are restraining motives, capable of preventing a great multitude of crimes.” This, as a general remark, is true, but if strong temptations are apologies for crimes, and the absence of these justifies exemplary punishments, offences against the sovereignty of a free government are most of all inexcusable. Here the power of the government is defined and limited, and if it be abused, the constitutional remedy is within the reach of the people. Violence, therefore, against such a government is a sort of *suicide*, without apology or excuse, and for which the punishment should be, in some measure, proportionate to the absence of motive or temptation.

* Montesq. Sp. Laws. English State Trials. Const. and Stat. U. S. and Maine.

All governments, however, the most despotic as well as the most free, punish with exemplary severity crimes which aim or tend directly to the subversion of the sovereignty—but from different motives. In despotic governments, the sovereignty is centered in the despot himself; and, as fear is the chief, if not the only motive to obedience, the more terror he can inspire the greater is his security. Free governments might punish with equal severity but from considerations that freedom is, of all things, the most valuable, and an attempt to destroy it is the most flagrant of crimes.

But there are other crimes against the sovereignty which tend to impair or undermine it—such as engaging in unauthorized hostilities, and thereby exposing the nation to war. Of a somewhat different character, but which, in its tendency, is pernicious and dangerous, as corrupting the fountain of liberty, is the violating or impairing the right of election.

Such is the salutary supervision of the United States Government, and the mild and paternal action of that of the State, that to meditate their subversion is without excuse, and should meet the reprobation of every one who would preserve the temple of liberty from violation. Happily for our common country, the attacks upon the governments, whether open or insidious, have been few and frail; and while monarchies, both despotic and free, have had their assassinations, rebellions and revolutions, we have withstood the machinations of foes without and foes within.

SECTION I.—TREASON AND MISPRISION OF TREASON.

Treason against the United States consists “only in levying war against them, adhering to their enemies giving them aid and comfort.” It is the highest crime in civil society, as its aim is the overthrow of the government, or, at least, a forcible resistance of its powers, and its tendency is to create universal

danger and alarm. We have cut off and excluded the long list of enumerated and constructive treasons which have disgraced the annals of English jurisprudence—and made the crime to consist—1st, in levying war; 2d, in adhering to our enemies, giving them aid and comfort. *Conspiring* to levy war is not treason, but if a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a *levying of war*.

There have been no judicial expositions of the clause which makes the crime to consist also in “adhering to our enemies, giving them aid and comfort.” By the decisions upon the same words, in the English courts, if the adherence, aid and comfort be in the realm or *elsewhere*, it is treason; and “enemies” are not only the subjects of a foreign power at war, but pirates and robbers who infest the coast. This adherence, aid and comfort is also treason, if afforded to rebels at home; if not in the character of *enemies*, it is in *levying war* against the king.

But *when* rebellion becomes revolution, and the revolted become “enemies,” are questions which the sovereign must decide not only with a view to his own rights, but with a regard to the laws of nations and the power of the rebels or revolutionists to retaliate.

The question of treason often involves the right of expatriation. While our Constitution recognizes the power in Congress to provide by uniform rules for the naturalization of foreigners, and Congress has exercised this power, no provision has been made whereby an American citizen may become expatriated or denationalized, and the doctrine of perpetual allegiance has been pretty strongly indicated by members of the Federal Judiciary. Should an American citizen, naturalized in a foreign country with which we should be at war, be indicted for treason for being found in arms against us, it would then

become necessary to decide whether he had, by this act of naturalization, become absolved from his allegiance to the United States.

Great Britain claims the right to naturalize our citizens, and and at the same time denies us a corresponding right in regard to her subjects. Should we adopt a similar practice towards her, one inconsistency may be well set off against the other. Indeed, it would be scarcely inconsistent at all, to naturalize the people of those nations that naturalize ours, and enforce the same doctrines of perpetual allegiance upon them that they enforce upon us. To determine, in short, that foreigners might *become citizens*, but that citizens should not *become aliens*.

The Constitution of Maine has defined treason in precisely the same words as the Constitution of the United States; and no doubt the provisions in regard to this crime were made upon the hypothesis that there might be treason against the State which was not at the same time treason against the United States. The opinion is entertained, and, it is believed, extensively, that there can be treason against a State, as such; that to levy war against the people of the State within the State, or to combine to usurp, by force, its government—or to adhere to its enemies, giving them aid and comfort, when engaged in war with a foreign power—would be treason against the State only. Upon some such ground, probably, the State of Maine has provided for the punishment of treason and misprision of treason.

It seems by the Constitution of the United States that a State may, by the consent of Congress, engage in war; and *without* such consent if actually invaded, or in such imminent danger of invasion as will not admit of delay. Now if in this state of things a citizen of the State should be acting with its enemies or be giving them aid and comfort, this might be State treason exclusively. Still the accused might be a citizen of *another State*, entitled, as he is by the Constitution, to the immunities and privileges of a citizen of Maine. In such a case the jurisdiction of the State court might well be questioned. But as the United States are obliged to protect a

State against invasion, and, on application of its Legislature, or of its Executive when the Legislature cannot be convened, against domestic violence, but few cases could occur, perhaps, where they would not so far participate in its defence as to entitle them to punish the treason.

Any person who, having knowledge of the commission of treason against the United States, shall conceal, and not as soon as may be disclose and make it known to the President or a Judge of the United States, or to the Governor, or Judge of a State court, is to be adjudged guilty of misprision of treason.

The State law defines misprision to consist also in the concealment or keeping secret of any treason, but without prescribing to whom it must be divulged or disclosed.

Both the Constitutions of the United States and of Maine require the testimony of two witnesses to the *same overt act*, or *confession in open court*, to effect a conviction. Confessions, indeed, are so liable to be extorted or distorted, are seldom remembered or reported accurately, often obtained unfairly, and very seldom capable of being disproved, that they should never be used to convict of a crime of such deep malignity, but when made in the presence and hearing of the court and jury, counsel and witnesses.

The punishment of treason, by both laws, is death, and the execution is by hanging. Misprision of treason is, by the United States laws, punishable by imprisonment not exceeding seven years and fine not exceeding one thousand dollars; by the law of the State, the punishment is imprisonment for not less than two nor more than five years, and *a forfeiture of goods and chattels and the profits of lands during life*. In cases of treason under either jurisdiction no corruption of blood or forfeiture of estate is allowed as a consequence, or part of the punishment.

SECTION II.—UNAUTHORIZED HOSTILITIES.

War is so perilous a remedy that no citizen or portion of the community has a right to engage in it without authority from the sovereign power—cases of necessary self-defence excepted. By the Constitution the power to make war is vested in Congress, and no State can engage in it without their consent, except in case of invasion, actual or threatened. How far this “consent” of Congress to a war of a State with a foreign power would involve the whole United States, is a question which it will probably never become necessary to settle.

From the character of our citizens and their spirit of enterprise, it was apprehended that we should have occasion to guard against unauthorized hostilities. And at the first organization of the government, the President (Washington) in one of his first communications, recommended to Congress “to provide the means of preventing aggressions upon friendly nations,” and other infractions of international law. In conformity to this recommendation, laws were enacted which punished with exemplary severity any citizen who should accept a commission or enlist into the land or sea service against a nation or people with whom we were at peace. Fitting out privateers, or being concerned in doing it, to cruise against a friendly nation, was also prohibited under severe penalties.

These enactments grew chiefly out of the French revolution and the wars consequent upon that event; and as soon as those wars and ours with Great Britain were terminated, our acts of neutrality were revised, and are embraced in that of the 20th of April, 1818, which provides the following punishments for the following offences:—

1. *Citizens within our jurisdiction* accepting and exercising a commission to serve a foreign power at war with one with whom we are at peace, either by sea or land, are punishable by fine and imprisonment not exceeding \$2000 and three years.

2. *Citizens without the limits of the United States* fitting out or being concerned in fitting out *privateers*, &c., to commit hostilities upon the citizens of the United States, or to command or have any interest in such enterprize, are to be punished by fine and imprisonment not exceeding \$10,000 and ten years.

3. *Any person within the United States* enlisting or entering, or hiring others to enlist or enter, or to go beyond the limits of the United States to enlist or enter, either in the land or sea service of a foreign prince or State, is made liable to fine and imprisonment not to exceed \$1000 and three years. *Transient foreigners* are excepted, who may enlist in a ship of war of their own nation, fitted and equipped as such on her arrival in the United States.

4. *Any person within the United States* fitting out and arming any ship or vessel to be employed in the service of a foreign prince or State to cruise against a friendly nation or people, or to be concerned, knowingly, in doing so, or delivering a commission within the United States for such ship or vessel to be thus employed, shall be punished by fine and imprisonment not exceeding \$10,000 and three years; and the vessel, and all materials and appurtenances are to be forfeited.

5. *Any person within our jurisdiction* increasing or augmenting, or to be knowingly concerned in increasing or augmenting the force of any armed ship or vessel of war, which at the time of her arrival in the United States belonged to a foreign prince or State, or the subjects or citizens thereof, at war with a nation or people with whom we are at peace, is punished by fine and imprisonment not more than \$1000 and one year.

6. *Any person to begin or set on foot within the jurisdiction of the United States*, or to provide the means for, any military expedition to be carried on from thence against the dominions or colonies of a foreign prince or State with whom we are at peace, is subject to fine and imprisonment not exceeding \$3000 and three years.

The President is authorized to employ the navy and militia

to compel an armed ship to depart in cases where by treaties and the laws of nations she ought not to remain. Owners of armed vessels are to give bond not to violate the provisions of the act, and collectors of the customs may detain suspected vessels until the pleasure of the President can be known, or until the owners shall give such bond.

In the winter of 1838, and during certain revolutionary movements in the British Canadian provinces, it was found necessary to enforce the neutrality act by additional provisions. To this end, Congress passed the act of the 10th March of that year, requiring the officers of the customs on that frontier, and such other officers as the President might designate, to seize vessels or materials for any military expedition intended or suspected for a conterminous colony of any nation with whom we were at peace—and that persons arrested for a violation of the act of 1818, and admitted to bail, shall give additional security not to violate or aid in violating that act. A speedy and efficient mode of trial was provided, and powers were vested in the President to employ the naval and military forces in execution of the laws of neutrality. This act was, however, limited to two years, has expired by its own limitation, and, as the occasion for it is passed away, it will probably not be revived.

SECTION III.—VIOLATION OF THE RIGHT OF ELECTION.

This is an offence against the sovereignty often perpetrated and too lightly punished. On days of election the sovereign power reverts to the people; and whatever influence, whether of wealth or power, is brought in conflict with the right of suffrage, is an attack upon the sovereignty. Destroy the independence of the elector, whether by influencing his hopes or fears, and you usurp his right. Whenever the power of wealth or the power of office, or both, or any other influence, shall be brought to bear efficiently upon the freedom of election, the

people will cease to be free, their liberties will become a mockery, and while the republic retains its *name*, its *principle* and *character* will be entirely changed.

The election laws are the same for the State and United States. The State laws are *the basis*, as the electors of the representatives in Congress in each State "shall have the qualifications requisite for electors for the most numerous branch of the State Legislature." In Maine the same qualifications for electors are required for Governor, senators, representatives, members of Congress, and electors of President and Vice President—and these qualifications are beyond the control of Congress. Whatever sinister influence is therefore brought to bear upon the elector, its effects are felt, not only in the State, but throughout the whole Union.

The qualifications, rights, and privileges of electors are defined in the second chapter of the first book of this work, and the powers of selectmen of towns and of the assessors of plantations in regard to elections are there referred to.

Assessors of taxes are sometimes chosen in the town, but it often happens that the selectmen are themselves the assessors. These assessors are obliged, on or before the first day of August, annually, to make out and deliver an alphabetical list of the voters to the selectmen, who, within ten days, are to revise and correct it. Assessors of plantations are to furnish themselves with like lists by the tenth of August. These lists are to be deposited with the clerks of the towns or plantations, and posted in a public place on or before the twentieth of August; and the presiding officers are to be provided with these lists at every election of Governor, senators, State and United States representatives.

Time is to be given previous to each meeting to furnish evidence of qualifications, according to the number of inhabitants; and if the selectmen or assessors knowingly and corruptly neglect or refuse to perform these duties, each is to incur a penalty not less than fifty nor more than one hundred dollars—and thirty dollars for every day's wilful neglect to provide the lists from the twentieth of August to the day of election.

If these officers neglect to notify and warn these meetings, or to preside at the elections, receive and ascertain, declare and certify the number of votes, or wilfully make false declaration or certificate of the votes, each of them incurs a penalty not to exceed eighty dollars. Recording officers neglecting to make record, or return an attested copy into the office of the Secretary of State, as required by the Constitution, each incurs a penalty of not less than forty nor more than eighty dollars.

If these presiding officers refuse the vote of a legal voter, the party injured may recover damages, even though the act was not wilful or corrupt. Any neglect or indifference as to the elector's right will be a sufficient ground of action.

Knowingly to receive the vote of a person not qualified, subjects the officer presiding to a penalty of one hundred dollars. Double voting, or disorderly behavior at an election, subjects the party to a penalty of not less than ten nor more than fifty dollars.

By late enactments, electors for State officers are voters in all town and plantation affairs. [See page 27.]

Lists of voters in town and plantation affairs are required to be made out by the 20th February, regulations are prescribed, and punishments inflicted for their violation, similar to those in State elections.

At almost every session of the Legislature some law is enacted to regulate elections. By an act of 2d April, 1836, the clerks of towns and plantations are required to deposite the votes for Governor &c. in a post-office in the State, within fourteen days, or deliver them at the Secretary's office within thirty days after the election, and penalties are prescribed for neglect. By the act of 24th March, 1835, to attempt to influence any elector by bribery, menace, or any other corrupt means, is made a high misdemeanor, and punishable by fine not less than fifty nor more than five hundred dollars.

CHAPTER THIRD.*

CRIMES AND OFFENCES AGAINST THE PERSON.

The crimes and offences which more immediately affect the persons of individuals, and in the punishment of which the safety of the public is chiefly consulted, are those which attack their personal safety, their reputation, and their liberty. In the *first* class may be ranked murder, manslaughter, assaults and batteries, and rape; in the *second*, libellous publications and malicious prosecutions; and in the *third* false imprisonment.

SECTION I.—MURDER.

Homicide is the killing of a human being, and is justifiable, excusable, or felonious. The first of these is where an executioner puts to death one under sentence for a capital offence, in the manner the law prescribes—where an officer attempting to arrest a man on process civil or criminal, is assaulted and kills the assailant—where any one, in attempting to take a man charged with felony, is resisted, and kills him—where an officer in attempting to disperse a mob, kills any of the rioters, or kills a prisoner attempting to escape—these cases are termed *justifiable*. And those killings of the second class which embrace *misadventure* and *self defence*, and which the common law denominates *excusable* because they imply some careless-

* Const. and Laws U. S. and Maine. Chitty's Crim. Law. Chitty's Bl.

ness or a sort of *culpable necessity*, are by our laws not distinguishable from justifiable homicide, as no punishment is annexed to them.

Murder is “when a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the peace of the State, with malice aforethought express or implied.”

It must be committed by a person of sound mind. Infants under the age of discretion cannot commit murder, and at *what* age depends much upon the intelligence of the infant—none under seven years, and few, probably, under *ten*, would be convicted and punished as murderers. The killing must be *unlawful*, not embraced in any of the cases of *justifiable* or *excusable* homicide. The person killed must be a *reasonable being*.

But if the person killed be an idiot it is murder—as it would be difficult to conceive of any one devoid of *all* rational powers.

Killing a child in its mother’s womb, though a high misdemeanor, is not murder, for it cannot be legally known whether it were killed or not. But it is said that if the wound or injury be inflicted *before* and the child die *after* the birth, this is murder. Yet a conviction in such case would be difficult, for a like reason that it could seldom be proved how the child came by its death.

Concealment of pregnancy and delivery willingly in secret of a bastard child, is punishable by fine not exceeding one hundred dollars; and endeavoring to conceal the death of such bastard child, so that it cannot be discovered whether it were born alive or murdered, is punishable by imprisonment and hard labor not exceeding five years. And if the female be indicted for murder, the jury may acquit of the murder and convict of either of the other offences.

By the common law, procuring an abortion was felony, and punished with death; and by the 43d George III, where the woman was *quick* with child it was death, and where not, it was *transportation*.

Killing in a duel is murder in the principal and seconds, and

the body shall be dissected and anatomized, and to this end the sheriff is to deliver it over to a professor of anatomy and surgery of a public college or seminary, when required in his behalf; but when no such requisition shall be made, the delivery may be to any surgeon who shall attend at the execution and engage to perform the service.

Suicide was punishable at common law, by an ignominious burial and forfeiture of goods and chattels; and he who advised it was an accessory before the fact. As the dead cannot be punished and the living are innocent, and both the burial and forfeiture would serve only to inflict additional pain upon innocent relatives and friends, the common law penalty and forfeiture are exploded and not known in our code. The accessory, or he who advised the suicide, ought, it would seem, to be punished; but whether as a *murderer* or as an *accessary* before the fact, where no punishable crime could be committed by the principal, is not certain.

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome.

It must be with *malice aforethought*—and this is not so properly spite or malevolence to the deceased in particular, as any general evil design—the dictate of a wicked, depraved, and malignant heart. This malice may be *express*, as where one kills another pursuant to antecedent menaces or preconcerted schemes, such as the case of duelling, where both the parties meet with an intent to murder—or *implied*, where one gives another poison, of which he dies—or if one lays poison for A, and B, against whom the prisoner had no malice, takes it and it kills him—in these, and such like cases, the law will imply malice.

Murder upon the high seas, or in any place within the exclusive jurisdiction of the United States, is cognizable in their courts, and the principles and proceedings are nearly the same as in the State courts. The jurors, however, are drawn, in ordinary cases, from the judicial district of the District Court, which in Maine is the whole State. But in capital cases,

twelve at least of the jurors shall be summoned from *the County* where the offence was committed.

Murder is punished by the State laws with death, and the court may add to the sentence that the body be delivered for dissection—but the execution is suspended for a year after sentence, and the Governor and Council may commute the punishment to imprisonment in the penitentiary *for life*.

Death is also the punishment by the laws of the United States, and the same power is given the courts to direct the body to be delivered for dissection. No power of commutation, however, is given in this case, but the President is authorized by the Constitution to grant reprieves and pardons.

Accessaries after the fact, or those who knowingly receive, harbor, comfort, conceal, maintain, or otherwise unlawfully assist a principal or his accessary before the fact, are, by the laws of the State, punished by imprisonment and hard labor not exceeding ten years.

Accessaries after the fact, or such as conceal and do not as soon as may be disclose and make known the crime to one of the judges, or some other person in the civil or military authority of the United States, are, by their laws, adjudged guilty of misprision of felony, and punished by imprisonment not exceeding three years and fine not exceeding five hundred dollars.

SECTION II. — MANSLAUGHTER.

This is the unlawful killing of another without malice, express or implied. It may be *voluntary*, upon a sudden heat, or *involuntary*, by the commission of some unlawful act. As to the first, or *voluntary* branch, if upon a sudden quarrel two fight and one kills the other, it is manslaughter; and so it is if upon such an occasion they go out to fight in a field, for this is one continued act of passion. And generally, in case of sudden provocation, if the killing ensues before there is sufficient time for passion to subside, it will reduce the crime to manslaughter.

The second branch, or *involuntary* manslaughter, is where killing was not designed, but happened in consequence of an unlawful act, or where a lawful act is done in an unlawful manner. In general, however, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it.

But the killing being proved, the burden of proof falls on the prisoner to justify or excuse it, or to reduce it to manslaughter.

By the laws of the State, the punishment of manslaughter is imprisonment and hard labor not exceeding ten years; and by the laws of the United States it is imprisonment not exceeding three years and fine not exceeding one thousand dollars.

SECTION III. — RAPE.

Rape is the carnal knowledge of a woman by force and against her will, or the carnal *knowledge* and *abuse* of any female child under the age of ten years, *with* or *without* her consent. The punishment of the principal offender or accessory *before the fact*, is imprisonment and hard labor for life.

In the case of a woman, consent, proved or inferred from all the circumstances, negatives the crime.

When the crime is committed on the high seas, or any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and without the jurisdiction of any particular State, the punishment by the United States laws is *death*.

By the *State* laws, *accessaries after the fact*, or those who “knowingly harbor, conceal, maintain, or assist” the offender or any accessory *before the fact*, are punished by imprisonment and hard labor not exceeding ten years; and by the laws of the United States the same punishment is inflicted in all cases where no other is provided.

An assault with intent to commit a rape is declared *felonious*,

and punished by imprisonment and hard labor not exceeding ten years, or by fine not exceeding five hundred dollars and imprisonment in the common gaol not exceeding one year. But if the assault be on a female child under the age of ten years, with such intent, the punishment is for a term of years or *for life*, at the discretion of the court.

If the assault is committed within the jurisdiction of the United States, the punishment is fine and imprisonment not exceeding three thousand dollars and three years. [See the next section—title, Assaults.]

SECTION IV.—ASSAULTS.

An assault is an attempt or offer with some degree of violence to commit some bodily harm, by any means calculated to produce the end if carried into execution—as levelling a loaded gun at another, within shooting distance. When the assault is accompanied with any the least touch, if done in a violent, angry, or revengeful manner, it is also a battery. Every battery includes an assault.

Assaults and batteries, if not of a high and aggravated nature, are punishable by justices of the peace by fine and imprisonment. They arise from sudden petty quarrels or affrays, and generally are induced by excessive use of ardent spirit. Correct magistrates are slow to interpose *in behalf of the State*, but direct the complaining party (and it not unfrequently happens that both parties are complainants,) to his private remedy by action for damages.

If, however, an assault and battery is high and aggravated, the examining magistrate, instead of punishing, should hold the accused by recognizance to appear at the State District Court, where the preliminary proceedings will be by a grand jury, and if an indictment is found, the *trial* will be by the court and jury as in other criminal cases.

Mayhem, or *maim*, is, by the common law, violently depriving a person of a member proper for his defence, in fight, and is a high and aggravated species of assault and battery. By the State laws, the injuries enumerated are, unlawfully “to cut out or disable the tongue, put out an eye, cut off an ear, slit the nose, cut off the nose or lip, or cut off or disable a limb or member”—and the punishment is imprisonment and hard labor, or imprisonment in the common gaol not exceeding ten years.

By the United States laws, the acts which define the crime are *the same*, and when committed within their jurisdiction the punishment is imprisonment and fine not exceeding *seven years* and *one thousand dollars*.

Assaulters with a dangerous weapon with intent to *maim*, and those present aiding and abetting, are deemed *felonious assaulters*, and are by the State laws punished by confinement to hard labor, or in the common gaol, not exceeding *four years*.

So assaulters with a dangerous weapon with intent to commit murder, robbery, or larceny, are deemed *felonious*, and punished by confinement to hard labor, in the first two cases not exceeding *twenty*, and the last not exceeding ten years.

Fighting (or challenging to fight) a duel, or aiding, abetting, or counselling when no duel is fought, is punished as for a *felonious assault*, and made a disqualification for office or place of trust, honor, or profit, for twenty years. Acceptors of challenges and their seconds are punished by imprisonment in the common gaol not exceeding one year, and disqualification as above for five years.

SECTION V.—DEFAMATION.

Verbal slander is not punished as a public offence—the injury not so far affecting the public peace as to authorize a criminal prosecution.

But scandal by writing, printing, painting, &c., which facilitates the diffusion of the accusation and gives it a lasting or

permanent character, becomes an offence tending to a breach of the public peace by exciting to revenge, violence, and bloodshed. And it has been considered as no justification, that the scandal represented is true, for the reason that if the party is guilty, the offence should be *prosecuted*, not *published*. But this doctrine has in Maine been greatly *modified*, if not entirely exploded. By the State Constitution it is provided that "no law shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine at their discretion the law and the fact."

This principle had been settled in Massachusetts before the adoption of the Constitution of Maine, but perhaps not to the extent of this provision. What would be the construction of the clause "where the matter published is proper for public information," is not easily determined. There has been no judicial decision that limits or defines the extent of this provision.

But in both houses of Congress and of the Legislature of the State, the members are not to be questioned elsewhere for words spoken in debate, whether they were *true* or false. It was determined by the Supreme Judicial Court of Massachusetts, upon a similar clause of privilege, that words spoken by one member to another while the house was in session but not in debate, were not within the provision. This was in the celebrated case of *Coffin v. Coffin*; but it is recollected that on that occasion the House of Representatives *resolved* that words spoken by any member *within the walls of the House*, relative to a subject under their consideration, either in their separate capacity or in a convention of both branches of the Legislature, (whether the member speaking such words addresses himself in debate to the chair, or deliberates and advises

with another member respecting such subject,) are alone and exclusively cognizable by this House"—and that for any other tribunal to interfere is a flagrant breach of its privileges. And it seems to be the settled doctrine, that this impunity extends to the members while sitting on committees in the lobbies, and to every act resulting from their office and in the execution of their official duty. It is not confined to the *legislative* functions of the body, but the protection extends to the Senate of the United States while acting in their *executive*, and much more in their *judicial* capacity. But inasmuch as these privileges are secured to members for the benefit of the people whom they represent, the rules and orders of each house should enjoin and preserve the strictest decorum of debate, lest these privileges should be perverted to purposes of malicious slander.

Libels, in England, are instituted 1st, by crown lawyers *ex officio*; 2d, on a hearing upon application by informers; or 3d, by *indictment*. The last mode is the only one admitted in our practice, and perhaps the only legal constitutional mode.

The reasons usually offered, that in public prosecutions for libels the truth is no defence, have been combatted with much force. It is urged that the tendency to a breach of the public peace is a mere fiction, and that the law that *verbal* slander, whether true or false, is no crime at all, proves it so; that the libeller should *prosecute* instead of publishing, is answered by the consideration that some charges are libellous which do not admit of prosecution, as to charge a man with having been *convicted* of felony for which he could not be again prosecuted. But the strongest objection to admitting the truth in justification, is in case of libel upon *private character*, where secrets *confided*, or transactions even of *childhood* might be developed, exposed, and proved, in no way beneficial to the public and injurious and afflicting in domestic relations. But it is answered that, even in these cases, a civil action, as the law now is, admits of the truth in defence, and a resort to an indictment is a sort of admission that the fact is capable of proof; and an unprovoked and officious attack upon private character is so revolting that a jury would require the most decisive evidence of the guilt *as charged*, before they would find a justification.

But for libels upon public men and candidates for election the truth is, by the Constitution, a good defence, and in all other cases "where the matter published is proper for public information." With this provision, and the superaddition of the right of the jury to determine the law and the fact, political and vindictive prosecutions are not much to be dreaded. There is quite as much danger, perhaps, of a criminal licentiousness in the party *in* and the party *out of* power, which may contaminate the press and through it the public morals.

It is probable, but not certain, that the provisions in our Constitution extend as well to public *bodies*, as to public *men*. An indictment at common law against an editor of a newspaper was, many years ago, sustained in the Supreme Judicial Court of Massachusetts, for a libel against the Senate, and the defendant, it is believed, was convicted and punished. But the proceeding was matter of much popular clamor, and probably of no benefit to the cause it was intended to aid.

In 1798 Congress passed what was denominated the sedition act. It prohibited writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the Government of the United States, either House of Congress or the President, with intent to defame either or bring them into contempt or disrepute, &c., under a penalty of *fine* not exceeding *two thousand dollars*, and *imprisonment* not exceeding *two years*. This act was limited to the 3d March, 1801, and expired by its own limitation. It authorized, to be sure, the truth to be given in justification, but the law was opposed and reprobated as tyrannical and unconstitutional. The ground of its unconstitutionality was that it conflicted with the first article of the amendments, which restricts Congress from making any law "abridging the freedom of speech and the press." It was answered that, as the truth might be given in evidence in full justification, this was no such *abridgement* as the Constitution inhibited. But be this as it may, the measure itself was impolitic and inexpedient. Although all crimes may be said to be against *the Government* and are so prosecuted, still libels are directed chiefly against some or all of the individuals

who exercise or administer it. The prosecutor is their officer, holding his place, perhaps, at the will of the person libelled. The Court is composed of Judges dependant in some measure upon the Government, and perhaps upon the individual member or members slandered. In these prosecutions, therefore, it is scarcely within the limits of probability, or consistent with imperfect human nature, that the trial should be equal and fair. At least very little credit would be given for impartiality. And in the trials arising under the sedition law, the public were excited, the passions were inflamed, and even *the ermine* was perhaps, in some instances, *stained*. One of the Justices of the Supreme Court was impeached by the House and tried by the Senate, for rudeness, vindictiveness, partiality, and acting the prosecutor instead of the Judge, in a trial under this act, and though he was acquitted for want of a concurrence of *two thirds*, yet there was a majority of votes for his conviction. This case is not cited *for* or *against* either of the parties in the controversies of that day, but as an illustration of the necessity of restraint upon public prosecutions for libels upon public men, and of the wisdom of the provisions in our own Constitution and laws which impose that restraint.

The punishment inflicted and required by that law was fine and imprisonment, and long after its expiration an application was made to Congress by one of the convicts, for redress, but it was refused. Had the law under which the conviction was had been adjudged unconstitutional by the Supreme Judiciary, a redress for the injury, so far as it was practicable, would probably have been granted.

By a late act of this State (see page 189) it is provided that unless where the matter charged as libellous *originated from corrupt or malicious motives*, the truth is a good justification.

SECTION VI.—MALICIOUS PROSECUTION.

In close alliance to the subject of the last section is that of *malicious prosecution*. This is scandal carried into a court of justice. But here the charge must not only be false, but groundless. The law in both cases gives the party injured his remedy in damages, and subjects the aggressor to a criminal prosecution. But no man is held responsible for the accusation he brings against another. In this country every man not only participates in making the laws, but he has an immediate interest in their faithful execution. Instead of screening from guilt, every citizen deems it his duty to bring offenders to justice. This vigilance and promptitude at detection is our substitute for a standing army, and troops quartered upon the inhabitants in time of peace. To hold every one to make good his accusation at his peril, would restrain and prevent all prosecutions upon suspicion or presumption, and perhaps many where the proof, *prima facie*, was evident. Crimes consequently would go unpunished, until resort would become necessary to spies and informers and other mercenaries, to protect the honest citizen from the depredations of the vicious. *Probable cause*, therefore, is a good defence, as well in a criminal, as civil suit, for a malicious prosecution.

SECTION VII—FALSE IMPRISONMENT.

The civil remedies for false imprisonment, both in restoring the party to his liberty and compensating him in damages for the injury and indignity, have been elsewhere considered. But the law superadds a remedy by a public prosecution, not so much to compensate the State for the outrage as to make an

example for the protection of personal liberty. Wherever the person was unlawfully detained, the common law pronounced it "a heinous public crime," and surely it is not less so where liberty is more valued, as it is more enjoyed.

Every confinement of the person is an imprisonment, whether in a prison, private house, or even by forcible detention in the streets. It is unlawful if done without sufficient authority, or if the warrant or authority is void, as issued from a court without jurisdiction of the case, or if executed at an unlawful time, as on the Sabbath. But arrests for crime, or on suspicion of crime, are necessary for the public safety, and the same reason and policy protects the person making them, as in the case of prosecuting offences, mentioned in the last section.

We have no statute defining the offence or prescribing the punishment—the common law being quite adequate for all purposes of *public* justice. The Constitution of Maine, however, as if from abundant caution, has, in guarding persons from unreasonable searches and seizures, provided that "no warrant to search any place or seize any *person or thing* shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause, supported by oath or affirmation."

The prosecution must be by indictment, and the punishment is fine and imprisonment.

CHAPTER FOURTH.*

CRIMES AND OFFENCES AGAINST PROPERTY.

Of the crimes or offences against *the property* of individuals, some are of the highest grade and most atrocious character. The law has kindly thrown a sanctity round every man's dwelling. It has made his house his castle, which is to protect him against all whom he chooses to exclude, so long as he keeps himself innocent of crimes and offences. Whoever unlawfully invades this sanctuary therefore, is guilty of a high crime against the community, for a violation of that last resort of the distressed, that last asylum of the poor and disconsolate. If there is any one thing more than another which even instinctive nature seeks with intense solicitude and perseverance, it is a *home*. It is *man's* first and last desire. Whether it be a palace, a cottage, a cabin or a cave, it is the place where the weary, the sick, the dying, *seek* repose or relief—the last refuge of the miserable—a foretaste, a kind of earnest of that everlasting home which is the consummation of the good man's hope—where the wicked cease from troubling, where the weary shall be at rest.

SECTION I. — ARSON.

The most aggravated crime, and that which inspires with most terror and dismay, (except murder, and that scarcely excepted) is *arson*. This is burning the dwelling-house of an-

* Stat. U. S. and Maine. Chitty's Bl and Crim. Law.

other in the night. But there must be an actual burning of the whole or some part of the house, as a mere intention or even attempt at burning, will not constitute the offence. But the malicious intent or attempt need not correspond with the act; for if one, intending to burn the house of A, actually sets fire to and burns that of B, it is arson. So if by setting fire to his own house, he burns that of another, if such a result was probable from such an act.

The statute of Maine makes the crime consist in "wilfully and maliciously setting fire to the dwelling-house of another, or any out-building adjoining to such dwelling-house, or to any other building with intent that such dwelling-house shall be burnt, and by the kindling of such fire or by the burning of such other building such dwelling-house shall be burnt *in the night time*." The punishment is *death*.

By the common law, any burning of any part of the house &c. is sufficient, though the fire be afterwards extinguished.

By the laws of the United States, if the crime is committed within its jurisdiction, it consists in "wilfully and maliciously burning any dwelling-house or mansion-house, or any store, barn, stable, or other building, parcel of any dwelling-house or mansion-house." The punishment is death, and, as it would seem, whether the crime is committed by night or by day.

And wilfully and maliciously to set fire to or burn any arsenal, armory, magazine, rope-walk, ship-house, ware-house, block-house, barrack, store-house, barn, or stable, not parcel of a dwelling-house, or other building than those first mentioned, or any ship or vessel built, building, begun, or repairing, any light-house or beacon, or timber, cables, rigging, or any other materials for these purposes, or piles of wood, boards, or other lumber, or military or naval or victualling stores, or other munitions of war, is punished by fine and confinement to hard labor not to exceed *five thousand dollars* and *ten years*.

By the laws of Maine, if the burning is in the day time—that is, when there is day-light whereby a man's face may be seen—or if a meeting-house, church, court-house, college, academy, or other building erected for public uses, or of a

store, barn, or stable of another within the curtilage of a dwelling-house, and by the kindling of the fire a public house or store &c. shall be burnt *in the night time*, the offender, aiders, abettors, and accessaries before the fact, are punishable by imprisonment and hard labor for life.

Burning these public buildings and stores, &c. in the day time, or by night, or by day, any other stores, &c., or any ship or vessel within the body of a county, is punishable by confinement to hard labor not exceeding ten years.

Burning stacks of corn, hay, grain, straw, corn-stalks, flax, fences, piles of wood, boards or other lumber, soil, grass, trees, poles, or underwood of another, wilfully and maliciously, is punished by confinement to hard labor not exceeding three years, or by fine not exceeding one thousand dollars and imprisonment in the common gaol not exceeding one year.

Accessaries after the fact are punished by confinement to hard labor not exceeding five years, or fine not exceeding five hundred dollars and imprisonment in the common gaol not exceeding one year.

SECTION II.—BURGLARY.

The next crime in point of atrocity against *the property* of any one, is *burglary*. “If any person with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other *felony*, shall in the night time break and enter, or having with such felonious intent entered, shall, in the night time, break a dwelling-house, any person being lawfully therein, and such offender being armed with a dangerous weapon, or arming himself in such house with a dangerous weapon, or committing an actual assault upon any person lawfully being in such house, every such offender and any person aiding, assisting, or consenting in such burglary, or any accessory thereto before the fact, by counselling, hiring, or procuring such burglary to be committed,”

such person shall be punished by confinement to hard labor for life.

If, in either of the above cases, the offender is *not armed* with such dangerous weapon, the punishment is confinement to hard labor *for a term of years or for life*.

Accessaries after the fact are punished by confinement to hard labor not exceeding ten years.

Entering a dwelling-house, &c. with such intent in the night time *without* breaking, or in the day time *by* breaking any dwelling-house, or out-house adjoining, &c., office, shop, warehouse, or ship or vessel lying within the body of a county, is punished by confinement to hard labor not exceeding three years, or by fine not exceeding five hundred dollars and imprisonment in the common gaol not exceeding three years.

The night time is when there is not day light enough begun or left to discern a man's face.

Breaking and entering in the night time a shop, warehouse, or office, not adjoining to or occupied with a dwelling-house, or any ship or vessel within the body of a county, and committing larceny, is punished by confinement to hard labor not exceeding fifteen years.

Entering a dwelling-house in the night without breaking, or, with it, in the day time, and putting the owner or occupant in fear, is punished by confinement to hard labor not exceeding ten years.

To constitute the offence of burglary there must be

1st, A *breaking*, which may be *before* or *after* the entry. This may be by taking out a glass or otherwise opening a window, picking a lock or opening it with a key. The doors being open, it is no burglary, unless after entry the offender unlocks an inner or chamber door. But to come down a chimney is burglary.

2d, The intent must be felonious—that is, to perpetrate some of the crimes mentioned in the statute—and it is the same whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act.

3d, The breaking must be of a *dwelling-house*, and some

person must be *lawfully* there. But a shop in which a man *works*, but *does not lie there*, is not his dwelling-house—nor can a principal burglary be committed in a dwelling-house *unoccupied*.

4th, The offender must be armed, before or after his entry, with a dangerous weapon—a weapon probably of defence or offence in the commission of the felony intended.

5th, Or he must commit an assault upon some person lawfully in the house—which is equivalent to being armed with the dangerous weapon.

SECTION III. — LARCENIES.

Simple larceny is the felonious taking and carrying away the personal goods of another. Mixed or compound larceny includes in it the aggravation of taking from one's house or person.

1. There must be a *taking*. Here the distinctions are numerous and subtle. If the offender lawfully acquired possession of the goods, under a mere charge, the owner still retaining the property, an embezzlement would be theft. If a master delivers property into the hands of a servant for a special purpose, it is felony to apply it to his own use. But if A lends a horse to B, and he rides away with him, this is no larceny; still the jury might infer that the hiring was with a felonious intention, which would constitute larceny.

2. The taking must be against the will of the owner, but if the owner encourages the *original intent* for the purpose of detection, it does not alter the character of the transaction.

3. There must be not only a taking, but *carrying away*. In the case of picking one's pocket, if the thief is detected before the property is detached from the pocket, it is no asportation. But a very slight asportation will suffice—as removing sheets from a bed into an adjoining room, to take plate from a trunk and lay it on the floor, to remove goods from one

end of a wagon to another, for the purpose of stealing and to facilitate the intent, is larceny.

4. The taking must be *felonious*, with a thievish, clandestine mind or intent to defraud the owner and convert the goods to his own use, or to destroy them, if done to serve the offender. *Finding and taking possession* is not larceny, unless the property is found where it is usually placed or suffered to be. But here it would seem that a clandestine taking or some secrecy indicated would be necessary to constitute the crime.

5. The taking and carrying away must be *of the personal goods of another*. Things attached to the realty are not subjects of larceny. The line of distinction between things real and personal has been noticed in another part of this work. By the statutes of Maine, simple larceny consists in feloniously stealing, taking, and carrying away of the property of another, *to wit*, money, goods or chattels, bond, promissory note, bill of exchange, or other bill, order, or certificate, or book account, deed or writing containing conveyance of land or other real estate, or any other valuable contract remaining in force, receipt, release, defeasance, writ, process, or public record.

By the statutes of the United States, stealing, taking away, or falsifying or making void a record, writ, process or other proceeding in any of the United States courts, by means whereof a judgment shall be made void, subjects to fine not exceeding five thousand dollars, or imprisonment not exceeding seven years and *whipping not exceeding thirty-nine stripes*.

By the same statutes, stealing on the high seas or within any fort, &c., within the exclusive jurisdiction of the United States, or having the custody of the arms or other habiliments of war belonging to the United States, or any provisions, &c. for the army, to embezzle, purloin, or convey them away, or to aid, abet, or counsel it, is punished by fine not exceeding four-fold the value and *whipping not exceeding thirty-nine stripes*.

Stealing the United States mail, or stealing or taking from it or from a post-office any letter or packet, with or without the consent of the person having the custody of it, and opening, embezzling, or destroying such mail, letter, or packet, the same containing

any article of value, such as evidence of debt or discharge, bank or other note, or bill of exchange, treasury warrant, assignment of stocks, letters of attorney or of credit, contract, record, or execution which, and the uses and purposes of which, are particularized in the act of Congress, is punished by imprisonment not less than two nor more than ten years.

The punishment imposed by the laws of the State, where the amount does not exceed five dollars, is not exceeding five dollars or imprisonment in the common gaol not exceeding twenty days, either or both, and the case is cognizable by a justice of the peace.

Where the property is in amount from *five to one hundred* dollars, confinement to hard labor not exceeding one year—or fine and imprisonment in the common gaol, one hundred dollars and a year; and where the property is more than one hundred dollars, it is confinement and hard labor not exceeding three years. Any person, for a second conviction, or three convictions at the same term, is punished as a *common and notorious thief*, by confinement to hard labor not less than three nor more than fifteen years.

Larceny in a dwelling-house, office, shop, warehouse, ship, or vessel, in the *day time*, or breaking and entering a church, meeting-house, court-house, town-house, college, or academy, or other building erected for public uses, or any mill, malt-house, store, barn, or stable, *in the night*, and there committing larceny, is punished by confinement to hard labor not to exceed five years.

The same punishment is prescribed for larcenies from *the person*, openly and violently, or privily and fraudulently.

Robbery is an aggravated larceny. It is the felonious and forcible taking from the person of another, goods or money to any value, putting him in fear. By the statute of Maine, if the robber shall, armed with a dangerous weapon, assault with intent to kill or maim the person assaulted and robbed, or being thus armed shall strike or wound him, he suffers imprisonment for life.

Robbery on the high seas, or in any river, haven, basin, or

bay out of the jurisdiction of any particular State, is, by the laws of the United States, punished with death. If it is done under color of a commission from a foreign power, the offender is to suffer death as a pirate, felon, and robber. Accessaries *before* the fact suffer as principal offenders, and those *after* the fact by imprisonment and fine not to exceed three years and five hundred dollars.

SECTION IV.—NUISANCES.

Private nuisances have been already examined. Public or common nuisances are a species of offence against the public order and economical regimen of the State. They consist in doing a thing to the common annoyance of the citizens, or omitting to do that which the common good requires.

Obstructions of, or negligence in repairing highways, bridges, and public rivers, are the most common. In a State so new and thinly populated as Maine, and whose surface is so broken, hilly, and even *mountainous*, and so intersected with rivers and streams, this branch of the subject is important and interesting; and although from these very considerations the provisions of our laws must in their character be *local*, some of the principles may not be uninteresting to other States.

Laying out, altering, and repairing highways, is confided to a court or *board* of commissioners in each county, and has been briefly referred to in Book IV, Ch. III.

Towns must make and repair all highways laid out within their limits. For this purpose, the money must be voted by the town, and assessed by the assessors, and the tax-lists delivered to the surveyors on or before the first day of June, and two thirds of the sum must be expended on or before the first day of July then next. The duties of the surveyors are particularly prescribed in giving notice and causing the work to be done. They are to remove obstructions, and may dig sand, gravel, &c., in lands not enclosed or planted, for the purposes

of construction and repair ; but they are not to cause a water-course occasioned by the wash of a highway to be conveyed by its side so as to injure the house or other building of any one, or obstruct him in his business, and such proceedings shall be subject to the examination and adjudication of the selectmen.

The highways, town-ways, causeways, and bridges are to be kept safe for travellers, with their horses, teams, carts, and carriages, at all seasons of the year ; and when these ways are blocked up, or incumbered with snow, the surveyors are obliged forthwith to cause it to be so removed, or trodden down as to make the roads passable ; and sudden injuries to bridges and highways are to be immediately repaired. If the sum assessed is insufficient, the surveyor, with the assent of a majority of the selectmen, may employ the inhabitants to make the repair at the expense of the town.

The surveyors, for neglect of duty, are made liable for all penalties inflicted on the towns for any deficiency. Injuries to persons or their property are to be compensated in damages by the towns or counties or whoever is obliged to repair the road ; and if loss of life is caused by the deficiency they are liable to be amerced in the sum of three hundred dollars, to be paid to the executor or administrator of the deceased for the use of his heirs.

Penalties imposed upon towns or others for violation of the laws in regard to roads, bridges, &c., are recovered by indictment of a grand jury, or information to be filed by the Attorney General or the prosecuting attorney for the State.

The fines imposed on towns are, by an excellent provision, to be appropriated and disposed of to repair the roads, &c. in the delinquent town, and the court before whom the conviction is had may appoint any person or persons to superintend the collection and expenditure, and care is generally taken that the fine shall be sufficient to put the road, &c. in good repair. Organized plantations have the same powers and are subject to the same duties and liabilities as towns in regard to roads, &c.; proprietors of townships are obliged to make the roads through their land, and roads through unincorporated and unsettled places are made by counties.

When buildings, fences, or other incumbrances are erected or continued on a public highway, common training field, burying place, landing place, or other piece of land appropriated for the general use, &c. of the community, a county or town, if judicially determined to be a nuisance and ordered to be abated, the materials shall be disposed of at auction to pay the costs of prosecution and removal, and if insufficient the deficiency is to be paid by the person convicted. But buildings and fences *fronting these places*, and *streets*, &c. of twenty years' standing, shall be considered as the true boundaries. But no time short of forty years shall justify the continuance of fence or building *on* these public places, &c., but the same may be removed as nuisances.

Temporary obstructions of the highways are nuisances, and the persons making or causing them are liable to indictment and punishment by fine and imprisonment. If wagoners or coachmen suffer their carriages and horses to remain on the sides of the highway to the annoyance of travellers, they are liable for the nuisance. But a mere transitory obstruction, which must necessarily occur, is excusable if all reasonable promptness is exerted. The delivery of any large articles, such as casks of liquor, if done with as little delay as possible, is lawful, though if an unreasonable time were employed it would become a nuisance. The actual obstruction of a public river, whereby the current is weakened or made less navigable, is a public nuisance. Yet, as in the case of highways, it is otherwise if the obstruction is transitory and removed as soon as possible.

All unwholesome or offensive smells which when injurious to private individuals are actionable, are, when detrimental to the public, indictable and punishable as public nuisances.

Gambling and disorderly houses, unlicensed inns or retailing shops, are nuisances.

Public nuisances have been classed with offences against *property*, although they are equally annoying to the health or personal comfort of the people. Still, as nuisances in public highways, whether roads or rivers, are those which chiefly

annoy us, and which most affect the *property* of the citizens, and do not directly impair the public health, it was thought proper to give them a place in this chapter.

SECTION V.—MALICIOUS MISCHIEF.

Malicious mischief is done with no apparent motive of gain by another's loss, but from a spirit of wanton cruelty or black and diabolical revenge. By statute, wittingly and willingly setting fire to woods or woodlands subjects to a penalty of ten dollars for each offence, one moiety to the use of the State and the other to the prosecutor; and parents, masters, and guardians are made liable for the acts of minors.

Cruelly beating horses and cattle subjects the perpetrator to a penalty (by far too small) of not less than two nor more than five dollars, or imprisonment in the common gaol not exceeding thirty days. This species of cruelty, so common but so barbarous, should be punished with exemplary severity.

The statute trespasses described in the second chapter of this book, such as cutting trees &c., throwing down bars &c., digging up and carrying away earths, plants, &c., and breaking glass, come within the definition of malicious mischief; and in addition to the action given for damages, subject the offender to a penalty for each offence of not less than one nor more than seven dollars.

Of this description is defacing or destroying any milestone or public monument, which subjects to a fine of not less than seven nor more than fifty dollars.

If any of these trespasses are committed in the night or in disguise, the penalty is not less than ten nor more than sixty dollars.

For *entering* a grass land, garden, &c., with intent to cut, destroy, or carry away, or injure the owner, and *having entered* with such intent and taking &c. or *breaking* or *mutilating* &c. fruit trees &c., subjects the offender to fine in the first case

not less than two nor more than ten dollars—in the second not less than five nor more than fifty—and in the third not less than ten nor more than one hundred dollars; and if *these* offences are committed on the *Sabbath*, or in the *night*, the penalties are *doubled*.

CHAPTER FIFTH.*

OFFENCES AGAINST THE PUBLIC HEALTH.

Health Laws are common to all countries, and they are more or less severe as the maladies to which the people are exposed are more or less malignant and contagious. The object of such laws is to prevent the spreading of infection, and to guard against the use of such food or the exercise of such employment as may be deleterious or destructive to health.

SECTION I.—CONTAGIOUS DISEASES.

It is a misdemeanor at common law to expose a person laboring under an infectious disorder (as the small pox) in the streets or other public place. Malignant disorders, or those which are most so, are the *plague*, *pestilential fevers*, and *small pox*. Such is the salubrity of our climate, that the first two can scarcely prevail to any great extent; and since the discovery of the preventive of the kine pox, the last has been nearly

* Const. and Laws State and U. S. Chitty's Bl. and Crim. Law.

subdued. By the laws of the State of Maine, towns are authorized to elect a *board of health*, or health officers, and where this is not done the selectmen are such *ex officio*. They may also choose superintendents of inoculation of the kine pox, but no power is given to compel the people to submit to the operation. They may neglect it, if they choose, and they generally do so until the small pox commences its ravages and creates an alarm.

No person is to inoculate for the small pox unless at some hospital licensed by the selectmen, on penalty of not exceeding one hundred dollars; and no such hospital is to be established within one hundred rods of a dwelling-house in an adjoining town without the consent of its selectmen.

In licensed hospitals, the physician and all the persons attached, and all property used in them, are to be subject to the orders of the selectmen.

On the unexpected breaking out of the small pox, the selectmen shall immediately provide the hospital, grant licenses for inoculation, prescribe regulations, and give notice to travellers of infected places—and each person violating the regulations is subject to a fine of not less than ten nor more than one hundred dollars.

If a householder, knowing of the small pox in his family, neglects to give immediate notice to the selectmen, he forfeits not less than ten nor more than thirty dollars.

Selectmen are authorized, on the arrival of sick persons from places infected with plague, small pox, or pestilential or malignant fevers or other contagious sickness, to remove such persons to a place of safety and provide them with proper nursing and attendance. Persons coming from infected places are to give notice of the fact within two hours after being informed that the law requires it, to some one of the selectmen, under penalty of one hundred dollars; and in case of refusal to depart, they may be removed by warrant from a justice of the peace. Any person *returning* during the prevalence of the distemper, without liberty of the justice, is liable to a penalty of four hundred dollars, and whoever harbors such person is subjected to a penalty of two hundred dollars.

The selectmen may appoint persons to guard ferries or other entrances, to prevent infection, with power to examine passengers, and to punish such passengers for travelling in the State without license.

Two justices may by warrant remove infected persons, and impress and take convenient houses, nurses, &c., for their accommodation. Baggage suspected to be infected, may be guarded and removed to a place of safety, and a penalty is prescribed against any who shall resist or refuse to aid.

Masters of vessels, seamen, and passengers, coming from places where an infectious mortal distemper prevails, may be examined on oath by the selectmen, and on refusal to answer, forfeit two hundred dollars—or in case of inability to pay, six months' imprisonment.

Vessels arriving at any port having infected persons on board, are not to be brought near the town or port, but must anchor below, and await the orders of the selectmen. The master violating this provision, forfeits two hundred dollars, and the pilot fifty dollars.

Selectmen are to enforce quarantine regulations, and may order any vessel coming in, where, in their opinion, the safety of the inhabitants requires it, to perform quarantine; and any owner, master, &c., who shall violate these regulations, is subjected to a forfeiture of not exceeding five hundred dollars, or to imprisonment not exceeding six months, or to both, according to the offence.

Master of a vessel coming up, after notice of quarantine, or attempting to elude the directions of the selectmen by false declarations of the port from whence he came, or landing any person or articles, &c., forfeits not exceeding five hundred dollars, or suffers imprisonment not exceeding six months, or both.

Pilots notified that vessels arriving from particular ports are ordered to perform quarantine, and failing to give notice of the order, forfeit not exceeding one hundred dollars.

Vessels at quarantine must have the red flag constantly hoisted on the mainmast; and every person going on board without

authority, is considered as *contaminated*, and undergoes the same purification as those belonging to the vessel, until discharged.

Notwithstanding the power to regulate Commerce, is confided to Congress, the quarantine and health regulations have always been considered as reserved to the States and it was an early provision of a law of the United States, that quarantine, and other restraints imposed by the health laws of the States, should be observed by collectors and revenue officers, and that the officers of the customs should aid in the execution of those laws. Where the health laws prohibit the vessel from coming to the port of entry or delivery, the collector may, if the condition of the cargo requires it, direct it to be unladen at some other unprohibited place, or under particular regulations.

In cases of prevalence of contagious or epidemical diseases in or near the port of entry, the treasury department may remove the custom house temporarily to some other place.

The President has the power in case of danger from such diseases to remove the public offices and to convene Congress, at some place of safety. The same power is given to the Judges of the United States Court as well as to remove prisoners confined in gaol. Like powers are given to the Governor and Judges of the States.

SECTION II.—SELLING UNWHOLESOME PROVISIONS.

It is an offence at common law to give any person injurious food to eat, whether the offender be excited by malice or a desire of gain. It is also a statute offence, and it is provided that if any person shall sell any diseased, corrupted, contagious or unwholesome provision, whether for meat or drink, knowing the same, without making it known to the buyer, he shall, on conviction, be punished by fine not exceeding one hundred dollars and binding to the good behavior.

The exercise of any trade or employment which might injure or impair the health of the people, is regulated by various statutes of the State, and has been noticed in other parts of this work, especially under the title of *NUISANCES*.

CHAPTER SIXTH.*

OFFENCES AGAINST PUBLIC JUSTICE.

The perversion of the administration of justice, in whatever shape it is done, whether by obstructing the execution of the laws, or corruptly or fraudulently influencing its decisions and results, is a crime against the community of a flagrant character, and often, it is feared, escapes punishment. Whoever has attended our courts for a series of years, and been an attentive observer of events there, must have been afflicted at the uncertainty of obtaining justice, administered even in the best way it can be. The operation alone of obtaining *truth* from the testimony of witnesses is so difficult, so uncertain, and so likely to fail, that an impartial observer would almost conclude that decisions were *accidental*, if nothing worse. To witness how often deliberate perjury is committed with the utmost indifference and recklessness, and to consider how many instances probably escape detection, and to reflect, moreover, upon the other influences which are brought to bear upon the decision of a cause, and it is enough to justify a rigid scrutiny into the crimes and offences against the administration of justice.

* Senate U. S. Documents—trials of impeachments. Rules and Orders Senate U. S. Const. and Laws U. S. and Maine. Hale and Hawkins, P. C.—Bac. Abr. Chitty's Bl. and Crim. Law.

SECTION I.—OBSTRUCTING THE COURSE OF JUSTICE.

I. CONTEMPTS.

The power to try, determine upon, and punish contempts, is incident to every court and essential to its existence. But as the proceedings are *summary* and without the intervention of a jury, *limits* should be prescribed to the court, lest the power of the judge should be wielded for purposes of oppression, malice, or revenge. Although the act which constitutes the contempt is an offence against public justice, it nevertheless is usually aimed more directly against *the judge himself*—so much so that it may not be always practicable for him to observe the strictest impartiality.

Any disorderly, contemptuous, or insolent behavior, committed during the session of the court, in its presence or so near as to annoy it or interrupt its proceedings, is a contempt. So is disobedience to its process—as, contemptuously refusing to be sworn as a witness, &c.

But how far publications, criticising or animadverting upon its proceedings, are contempts, has been matter of grave and able discussion. All the doctrines that bear upon this branch of the subject were examined and discussed in a late impeachment of a judge of a District Court before the Senate of the United States. By an examination of these cases it is manifest that, *pending the suit*, any misrepresentations of the conduct or impeachment of the motives of the court, is punishable as a contempt, by the summary process of attachment. In this case, the judge for the district of Missouri had decided a cause and given his reasons, and had moreover caused his decision and argument to be published in a newspaper. The case, it seems, had been appealed to the Supreme Court of the United States, and the appeal was then pending. A member of the bar who had been engaged as counsel in the cause,

in answer to the judge's publication, examined the decision and criticised it with considerable severity, and probably misrepresented the judge in his statement of the facts and the law. For this, at a subsequent term, he was *attached* as for a contempt, brought before the court, and, refusing to answer interrogatories, was committed to prison. For this the judge was impeached, tried, and acquitted. The Constitution requires two thirds to convict, but in this case there was an *actual* majority against a conviction. The reasons of the senators are never given, and it would be therefore presumptuous to conjecture upon what grounds he was acquitted. It is not to be inferred, however, that the principle was in that case established, that after a cause is decided, and its decision made public, and the session of the court terminated, it would subject any one for a contempt who should examine the decision, and even censure, if the motive of the judge was not impeached. In that instance, the case had not been decided finally, and might be *remanded* for further investigation, and other cases were pending in court, depending upon the same principles. It is probable, after all, that the cases there cited, both English and American, (especially the American,) came so near a justification that they went so far as to negative *the malice*.

In consequence of this acquittal, the act of 2d March, 1831, was passed, limiting contempts to misbehavior in the presence of the court, or so near as to obstruct the administration of justice, or of its officers in their official transactions, or disobedience or resistance to any lawful precept or process of the court.

II. OBSTRUCTING LAWFUL PROCESS.

Another species of offence against public justice is obstructing the execution of lawful process—and it is more aggravated when the obstruction is of *criminal* process. By the laws of the United States, any person knowingly and willingly to obstruct, resist, or oppose any officer in the execution of any legal process issuing from any court of the United States, or who shall assault, beat, or wound such officer or other person duly authorized, is punishable by imprisonment not exceeding

twelve months, and fine not exceeding three hundred dollars. And by the above act of 2d March, 1831, to endeavor corruptly or by threats or force to influence, intimidate, or impede a juror, witness, or officer in his duty, or to obstruct the administration of justice, is punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months.

III. ESCAPE.

By the State laws, if a gaoler or other prison-keeper *voluntarily* suffers a prisoner to escape, he is made liable to undergo the same punishment and penalties as the prisoner so escaping should by law for the crime or crimes wherewith he stood charged, had he been convicted. Except that if the prisoner escaping was charged with a capital felony, the punishment is fine and hard labor in the State prison not exceeding one thousand dollars, and not less than five nor more than fifteen years; if after conviction of a capital felony, the punishment, in addition to the *fine*, is hard labor for life.

For a *negligent* escape, the keeper is to be punished by fine at the discretion of the court; but in case of the escape of a debtor, if the keeper retakes him within three months and returns him to prison, he is liable for nothing further than the costs of any suits that may have been commenced against him for the escape. Keepers of prisons are, by the law of the State, obliged under like penalties to take custody of and safely keep all prisoners committed under the *judicial* authority of the United States until discharged by due course of the laws thereof.

IV. RESCUE.

Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment.

By the laws of the United States, to set at liberty or rescue any person found guilty of treason, murder, or any other capital offence, is punished with death.

If the rescue is *before* conviction, or if *after* and the offence is not capital, the rescuer is punished by fine and imprisonment not exceeding five hundred dollars and one year.

V. PRISON BREACH.

By the State laws, conveying tools into prison to aid a prisoner to escape, subjects to a fine not exceeding three hundred dollars, or such corporal punishment not exceeding *forty stripes*, as the court may inflict.

If the prisoner in fact escapes by means of the tools conveyed, the offender is to pay all such sums of money as the prisoner stood committed for, and to suffer such punishment as the persons escaping would have suffered, had he been convicted—unless he would have been liable to capital punishment, in which case he is to be punished by fine, imprisonment, *sitting on the gallows with a rope about his neck*, or confinement to hard labor not exceeding five years—one or more of these punishments, according to the offence.

As the United States have hitherto been dependent upon the States for prisons, the punishments for prison breach, whereby one of their prisoners escapes, must depend on State legislation and adjudication. How far Congress could legislate on the subject of *negligent* or *voluntary* escapes of United States prisoners from a State gaol, or give their own courts jurisdiction in offences committed by State keepers of United States prisoners, is very questionable. Any conflict of power in this respect may be avoided, however, by providing gaols for their own prisoners.

SECTION II.—CORRUPTLY INFLUENCING THE ADMINISTRATION OF JUSTICE.

To bribe or offer to bribe a Judge of the United States courts to procure an opinion, judgment, or decree, in any case pending, is punished in the person *giving* or *offering* and the Judge *receiving*, by fine and imprisonment at the discretion of the court, and perpetual disqualification of *both* to hold any offices of trust, honor, or profit under the United States.

But there are many ways in which a Judge so disposed may improperly influence the administration of justice, for which no punishment can reach him. The Judges are liable to impeachment for *official misdemeanors*, and, upon conviction, to removal from office and disqualification. The Judges of the State courts, too, may be removed for *other causes* by the Governor and Council upon the address of both houses of the Legislature. But this last power has become merely *nominal*, from a reluctance to exercise it, especially by the *professional* members of the Legislature, whose success so much depends upon their standing with the courts, and whose influence in judiciary matters is generally powerful.

By the Constitution of the United States, the Judges may be removed and disqualified on impeachment for treason, bribery, or other high crimes and misdemeanors.

No case of impeachment of a Judge has occurred in Maine, and but three of the Judges of the United States have been impeached since the adoption of the Constitution. Two were for charges of partiality and oppression, and were acquittals. One was for partiality and corruption and a conviction. The acquittals, however, in both cases, came so near convictions that very few Judges, perhaps, would be willing to endure such ordeals for the sake of such results.

Neither acquittals or convictions on impeachment prevent indictment and trial at law.

Among the other offences of corruptly influencing the administration of justice, are—*common barratry*, which consists in exciting and stirring up suits. There must be three cases at least to constitute the offence. *Maintenance*, which is an officious intermeddling in a suit which in no way belongs to one, by maintaining either party with money, or otherwise to prosecute or defend it. *Champerty*, which is a bargain with plaintiff or defendant to have part of the property in dispute, in case of recovery. *Embracery*, or attempting to influence a juror in a cause by promises, persuasion, money, &c. *Compounding of informations*, upon penal statutes, and *conspiracy* to indict an innocent man of a crime falsely and maliciously, who is accord-

ingly indicted and acquitted. These offences are indictable, and upon conviction are punished by fine and imprisonment.

SECTION III. — PERJURY.

Perjury is defined to be “a crime committed when a lawful oath is administered in some *judicial* proceeding to a person who swears *wilfully*, *absolutely*, and *falsely* in a matter *material* to the issue or point in question.” Though its effect, and often its object, is corruptly to influence the administration of justice, there is superadded, moreover, the guilt of false swearing, the tendency of which is to overthrow the temple of justice itself.

By the statutes of Maine, it is punished by confinement to hard labor not less than two nor exceeding fifteen years; and for *subornation* of perjury the penalty is the same, and for attempting it confinement to hard labor not exceeding five years.

By the laws of the United States, an oath taken as required by any law of the United States, if false, is *perjury*, whether administered in a *judicial* proceeding or not, and subjects the offender to fine not exceeding two thousand dollars, and confinement to hard labor not exceeding five years; and subornation of perjury subjects to the same penalty.

In many cases, false swearing is made perjury by the State laws, although the oath was not administered in a judicial proceeding.

SECTION IV. — OPPRESSION AND EXTORTION OF OFFICERS.

Fees for services of officers &c. are established by the laws of the State, and if any person shall wilfully and corruptly demand and receive any greater fee or fees for services than

are by law allowed and provided, he shall forfeit and pay not less than five nor more than thirty dollars.

Extortion under or by color of office, is punished by the laws of the United States by fine not exceeding five hundred dollars or imprisonment not exceeding one year.

SECTION V.—BUYING DEMANDS FOR THE PURPOSE OF SUITS.

This traffic in lawsuits is a statute offence, nearly allied to *common barratry*, but more odious, as it is done chiefly by lawyers, magistrates, and other officers, and may be easily concealed, and is generally pursued so long as there is profit in the accumulation of costs. It is a State offence, and the statute provides that if any person, with an intent thereby to procure himself to be retained as an attorney or employed as a justice of the peace, sheriff, deputy sheriff, coroner, or constable, in the collection of any note, account, or other demand whatever, by a lawsuit, or with intent thereby to procure any promisory note &c. for the purpose of making to himself any gain or profit from the writ of fees arising in the collection thereof by a lawsuit, *shall, directly or indirectly*, loan or advance any sum or sums of money, or shall promise to do so, or forbear or give day of payment, or promise to do so, or assume any debt, or purchase goods, or give or promise any valuable consideration whatever with intent thereby to procure any demand &c. for the purpose of profit from the writ or fees, by a suit, he shall forfeit not less than twenty nor more than five hundred dollars, by indictment for the use of the State, or by action one moiety to the prosecutor and the other to the county.

From the particularity of this statute, it is manifest it was intended to ferret out those who had perverted the law to the purchase of suits for purposes of gain, and that the practice had become so mischievous as to demand legislative interference.

If the offence, when committed by an attorney or other officer of the court, is not punishable by the summary process of attachment for contempt, this might be made so by legislative enactment; and this amplification of the doctrine of contempts, properly defined, instead of becoming *dangerous*, might be very *salutary*.

CHAPTER SEVENTH.*

CRIMES AND OFFENCES AGAINST TRADE.

The crimes and offences against trade consist of fraudulent acts against individuals, by which private confidence is impaired, or against the public, whereby the revenues of the nation are invaded or dilapidated. Commercial nations observe with scrupulous exactness the faith of contracts, as the very basis of their prosperity; and it is a consequence of this that their laws punish with exemplary severity all frauds in commercial transactions. Frauds, too, upon the revenues, are not only injuries to the treasury, but by a successful system of smuggling, the honest merchant is discouraged and defeated in his enterprises. While, therefore, the law punishes the violator of confidence in private transactions, it is, as well for the sake of trade as for the sake of the revenues, quite as severe upon custom-house frauds.

The crimes and offences against trade or commerce are comprehended under the titles of *forgery*, *usury*, *cheating*, *violation of inspection laws*, and *frauds on the revenues*.

* Const. and Laws U. S. and Maine. Regulations Treasury Department. Treasury Reports.

SECTION I.—FORGERY.

The common law definition of forgery is “the fraudulent making or alteration of a writing to the prejudice of another man’s right.” The statutes of Maine and the United States use the same terms in its definition, *viz.*—“*falsely making, altering, forging, or counterfeiting.*” Persons procuring, causing, aiding, assisting, or abetting, are alike included and subjected to the same punishments.

The State laws embrace the following *subjects* of forgery :—

1. Public records and official certificates, which would be *legal proof*.

2. All assurances and discharges of property either in *possession* or *action*, from title deeds and releases down to simple receipts, and even lottery tickets.

Publishing either of these as true, knowingly and with intent to defraud, subjects the offender to the same punishment, which is confinement to hard labor not less than two nor more than ten years.

3. Bills of credit issued by State authority, and bank bills or notes issued from any State bank, or having in possession at any one time not less than *ten*, knowingly and with intent to pass them—the offence is punished by hard labor *for life*.

4. To utter or tender in payment as true, any of these *bills*, knowing them to be false, with intent to defraud, subjects for the *first* offence to hard labor not exceeding three years or fine not exceeding one thousand dollars, and binding to the good behavior for two years; for the *second* conviction, or *three* convictions at the same term, the person is adjudged “a common utterer of counterfeit bills,” and punished at hard labor not less than *two* nor more than *ten* years.

5. To bring into the State, knowingly and with intent to pass them, any counterfeit bills of any bank within the United States, is punished by hard labor not exceeding *three* years, or

by fine not exceeding one thousand dollars, and imprisonment in the common gaol not exceeding *two* years.

6. Engraving, forming, making or mending any instrument for the purpose of counterfeiting any of these bills, or having in possession such instrument with intent that it shall be used for the purpose, subjects the offender to hard labor not exceeding three years, or fine not exceeding five hundred dollars and imprisonment in the common gaol not exceeding *one* year.

7. Forgery of the current gold and silver coin of the State, or knowingly to have in possession not less than ten pieces with intent to pass them, is punished by hard labor *for life*.

8. Bringing into the State any number of such pieces, or passing them knowingly and intentionally, subjects to hard labor not exceeding *three* years, or fine not exceeding one thousand dollars and binding to the good behavior for *two* years; for a *second* conviction, or *three* at the same term, hard labor not less than *two* nor more than *ten* years.

The statute laws of the United States embrace the following cases of forgery and its kindred crimes, for which the annexed punishments are inflicted:—

1. For forging a letter of attorney or other authority to *assign* or dispose of any share or sum in the public stocks, or to receive any dividend, or any pension, prize money, wages, or other debt due from the United States, or knowingly and fraudulently to endeavor to obtain any benefit from such forgery, or to personate any one who is entitled to the benefit of the paper thus forged—the punishment is fine not exceeding five thousand dollars and hard labor not exceeding *ten* years.

2. Forgery of any indent, certificate of stock or debt, treasury note or other public security of the United States, bill, check, or draft for money by or on the United States Treasurer or any other public authorized officer, or knowingly passing or attempting to pass as true such forgery with intent to defraud the United States or any one else, is punished by fine not exceeding five thousand dollars and hard labor not exceeding *ten* years.

3. *Falsifying* any record or process of any court of the

United States, whereby a judgment may be avoided or defeated, or acknowledging in court any judgment, recognizance, or bail, in the name of any person not privy thereto, is punished by fine not exceeding five thousand dollars, or imprisonment not exceeding seven years and whipping not exceeding thirty-nine stripes.

4. Forgery of an abstract or official copy or certificate of the recording, registry, enrolment, or license of any ship or vessel in the office of a collector of the customs, or any certificate of ownership, pass, passport, sea letter, clearance, or any permit, debenture, or other official document, or to pass or attempt to pass such forgery as true, knowingly and with intent to defraud, is punished by fine not exceeding one thousand dollars and hard labor not exceeding three years.

5. Forgery of the gold and silver coin of the United States, or any other foreign current gold and silver coin, or knowingly passing or attempting to pass, or bringing into the United States for the purpose of passing it, with intent to defraud, is punished by fine not exceeding five thousand dollars and hard labor not exceeding *ten years*.

For the same acts in regard to the copper coin, the punishment is fine not exceeding one thousand dollars and hard labor not exceeding *three years*.

6. Officers of the *mint* conniving at a debasement of the coin, or embezzling any metal deposited for coining, are punished by fine not exceeding one thousand dollars and hard labor not less than *one* nor exceeding *ten years*.

7. Forging or knowingly passing as true, using, or selling a certificate of citizenship, is punished by fine not less than five hundred dollars nor more than one thousand dollars, and hard labor not less than *three* nor more than *five years*.

To constitute the crime of *forgery* there must be

1st, A sufficient *making* or *altering*. But any insertion or erasure in a material point by which another may be defrauded, is forgery—as, the application of a false signature to a true instrument, or a real signature to a false one, or altering a date whereby payment may be accelerated.

2d, The *intent* must be to *defraud*—and therefore the mere imitation of another's name, or the alteration of a written instrument, where no person can be injured, does not come within the definition of the offence. But it is not necessary that an actual injury should result from the act.

3d, There must be a sufficient resemblance to the genuine, to impose on those to whom it is uttered. But it is not necessary it should effect the purpose intended.

4th, To constitute an *uttering* of the forged instrument as true, there must be a guilty knowledge that it was false—as, where a prisoner sent a boy who was ignorant of the fraud with forged notes to be exchanged for goods, and the boy made the exchange and delivered the goods over. This was adjudged an *uttering* by the prisoner, but not by the boy.

SECTION II. — USURY.

“Usury is an unlawful contract upon the loan of money to receive the same again with exorbitant increase.”

The laws of the State which made void all usurious contracts, were repealed by that of the 8th of March, 1834, and consequently the decisions on the usury laws previous to that time have little or no bearing on the subject. Six per cent. is and always has been the legal interest in Maine. By the act above referred to, “if any person or persons, upon any contract hereafter made, shall take, directly or indirectly, for loan of any monies, wares, or merchandize, or any other commodities, above the value of six dollars for the forbearance of one hundred dollars for a year, and so after that rate for a greater or less sum, or for a longer or shorter time; and if upon any bond, contract, mortgage, and assurance, made for the payment of any money lent or covenanted to be lent upon or for usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars in the hundred as aforesaid, the debtor or defendant may plead this act, and thereby avoid the excess over and above said legal rate.” This provision, so far as re-

gards all contracts *subsequent* to its enactment, changes the whole doctrine in regard to usury.

In any suit on any usurious contract &c., the debtor (the creditor being alive,) may offer in court to swear, and being required by the court, if he shall swear, to the usury, he shall be *exonerated of the excess*, unless the creditor will on oath deny it.

Any person *paying* any such excess, or his representatives, may, within one year, recover the same of the person receiving it, or his representative. But these provisions are not to extend to bills of exchange or promissory notes payable to order or bearer, in the hands of an endorsee or holder who shall have received the same in good faith and for a valuable consideration, and who had not, at the time of discounting the note or bill, or paying the consideration, actual notice of the usury.

Defendants reducing the damages, by oath, do not *pay*, but *recover costs*.

SECTION III.—CHEATING.

Cheats are deceitful practices in defrauding or endeavoring to defraud another of his known rights by means of some artful device, contrary to the plain rules of common honesty. As, by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written—changing corn, by a miller, and returning flour made of bad instead of the genuine grain.

But in such impositions, or deceits, where common prudence may guard persons against suffering from them, the offence is not indictable. These cheats are punishable at common law, and the statute of Maine has provided that “all gross frauds and cheats *at common law*,” shall be punished by fine not less than forty nor more than four hundred dollars, or confinement to hard labor not exceeding seven years.

The same statute provides that “all persons who knowingly and designedly, by false pretence or pretences, shall obtain

from any person or persons, money, goods, wares, merchandize, or other things, with intent to cheat or defraud any person or persons of the same," shall be subject to the same punishment.

SECTION IV.—VIOLATION OF INSPECTION LAWS.

By the Constitution of the United States, it is provided that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, *except what may be absolutely necessary for the execution of its inspection laws*; and the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress."

Congress, it will be recollected, is prohibited to pass any law laying any duty on *exports*; and the tax for inspection, though a duty on *exports*, is, when imposed by a State, to be subject to the revision and control of Congress. It is important to commerce, that articles of export should be subject to *inspection*. But to have vested this power in the United States, with the consequent appointment and control of all the officers in this department, would have given them an undue influence in the domestic or municipal concerns of the States. The State, therefore, may impose a duty for inspection on its exports—but it must be an *inspection duty merely*, and is to be always subject to the supervision of Congress.

The inspection laws of Maine embrace the following articles of produce and manufacture:—beef, pork, butter, lard, fish, pot and pearl ashes, hops, tobacco, onions, flax seed, lime, nails, lumber, fuel, &c. They are under the supervision of inspectors, whose duties and liabilities are specially prescribed. The general provisions are, that the articles are to be *inspected*, and *branded* with the kind and quality, and the exporter is, in most cases, to deliver a certificate thereof to the collector of the customs. Penalties are prescribed against inspectors and

other officers, and against exporters, for any deceit or violation of the law in the quality, packing, or exportation. The penalties are recovered by information or action, and the articles, in some cases, may be seized, libelled, condemned, and sold.

SECTION V.—FRAUDS ON THE REVENUES.

The people who have to sustain the public burdens should be secured in an equal distribution of those burdens, and in a faithful application of their money for their benefit. If there are means whereby to escape the operation of taxation, or to embezzle the money after it is collected, each is not only a fraud upon the treasury, and thereby embarrassing to the government, but it is inflicting an injury upon the people who must be taxed for this to supply the deficiency. The people here are in more danger from both of these sources, from the fact that they are liable to two kinds of taxes and two sets of tax-gatherers. The State taxes must be assessed and collected for its own use and by its own officers.

The State revenues are derived chiefly from taxes on real and personal property, with a small assessment on the *polls*. This combines taxation on *property*, *income*, and *labor*. The towns are assessed by their own officers, according to a valuation equalized by the Legislature, and inasmuch as the whole property of the town is held pledged for the payment of its *quota*, there is little danger of frauds on the revenues of the State. Punishments are prescribed for delinquency or fraud in the collection and payment into the treasury, but after all, the town, in case of defaulters, is re-assessed to supply the deficiency—so that the people of each town become the sufferers from the default or fraud of their own officers.

The towns must elect their assessors of the taxes—and in case none are elected, the selectmen are assessors *ex officio*. If an assessor refuses to be sworn, he is punishable by a fine of fifteen dollars; and in case the town neglects or refuses to

elect assessors and selectmen, it is subject to a penalty of not less than one hundred nor more than three hundred dollars, and the court or board of county commissioners may appoint assessors.

The State treasurer sends his warrant for the taxes to the sheriff of the county for the town's quota of the State tax, who is to transmit it to the assessors, and they are obliged to obey it on penalty of the full sum required by the treasurer's warrant, and the commissioners are, in case of refusal, to appoint assessors.

Assessors must give notice in a reasonable time before the assessment, to the inhabitants, to bring in a list of their *polls** and *estate* (real and personal), and they may require such lists to be sworn to. They may add the county and town taxes to their list of State taxes, and shall observe such rule as the Legislature shall have prescribed in the last tax act.

Where no assessors are appointed, the State treasurer may issue his warrant to the sheriff to collect the tax of the inhabitants.

When the estates of delinquent assessors shall be insufficient to pay the tax, the same may be levied on the inhabitants.

The towns appoint and are responsible for the fidelity of their *collectors*. In case of no collector, *eo nomine*, the *constable* acts in the capacity and performs the duties. Every collector should give bond for his fidelity, and must be under oath. He acts by virtue of a warrant from the assessors, accompanied by the *tax list*, in which the name and sum of each is inserted; and in case of failure to pay, the tax of the delinquent is to be collected by distress and sale, and in default of property by an arrest and imprisonment. These collectors have, like sheriffs and other such executive officers, the power to require *aid* in the execution of their duties, and penalties are prescribed against those who refuse. They are to exhibit to the selectmen or assessors, once in every two months, an account of the

* The polls *now* include the male population of the age of *twenty-one* years and upwards, only—formerly, *sixteen years and upwards*.—[See the error in Book First, Part II, Ch. I, page 51.]

money received on their tax bills, and produce the treasurer's receipts for all they shall have paid in, on penalty of two and a half per cent. on the amount of the tax.

Towns may discharge a collector who is about to remove, and appoint a substitute; and if the collector shall refuse to deliver up his tax bills and money collected, he forfeits two hundred dollars, and is made liable for the amount due on his bills. If the collector becomes disqualified, he may be superseded and his lists taken from him and given to another.

Delinquent collectors are liable, by warrant from the State treasury to the sheriff, to distress and sale, and in default of property to arrest and imprisonment.

The inhabitant whose property may be taken to pay the deficiency of a delinquent assessor, has his remedy against the town for the value of his property taken, and twelve per cent. from the time it was taken.

Provision is made for enforcing payments against deficient constables and collectors, or in case of their decease before their collections are completed, and against sheriffs for neglect to execute warrants against such constables and collectors, and for the ultimate liability of the town.

But the United States government is the great collector and purse holder. It is here that most of the public money is received and disbursed, and here therefore we are to look for smugglers and defaulters. Men have always affected to make a moral distinction between crimes and offences against *the public*, and against *the government*. A crime which attacks the life, liberty, or property of a citizen, we readily condemn as a *public injury*. But to rob an arsenal or magazine, or defraud the revenue, as it effects no immediate individual injury, is a very venial offence, or viewed, at least, with much charity. So long as this philosophy is indulged or inculcated, it will be difficult to inflict, for frauds upon the revenues, punishments proportionate to the danger and magnitude of the offence.

The revenues of the United States are derived chiefly from *impost* and the *public lands*. Though the avails from the sales of these lands afford no inconsiderable portion of the revenues,

and the laws regulating the sales and the receipts and disbursements are interesting as part of our financial system, and the frauds thereupon affect indirectly every citizen, still, our interest in them is so remote, and our limits so circumscribed, that their consideration must be excluded.

The frauds upon the revenues arising from *impost* are—1st, *smuggling*; 2d, *unfaithfulness in the collection*; 3d, *embezzlement by receiving and disbursing officers*.

I. *Smuggling* is the offence of importing or exporting prohibited goods or other goods without paying the customs or duties. Though we can have no duties on *exports*, except such as may be necessary for the execution of the State inspection laws, yet the exportation of certain articles may be *prohibited* entirely, and the violation of such prohibitory laws would become a punishable offence—witness the embargo laws, whereby all exportation was prohibited under severe penalties.

False registers, which give a foreign vessel an American character, are among the means of illicit traffick for the purpose of defrauding the revenues. We have seen, under the title of *Forgery*, that for forging, counterfeiting, or altering any registry, enrolment, or license, or any certificate of ownership, &c., the punishment is fine and confinement to hard labor not exceeding *one thousand dollars and three years*.

False invoices, or goods invoiced at *less* than the actual costs, is a very common mode of defrauding the revenue. If this is done “with design to evade the whole or any part of the duties,” it is punished by a forfeiture of the goods or their value.

The collector, suspecting fraud in this matter, may retain the goods at the risk and expense of the owner &c. until appraisement; and *after entry*, he may, on like suspicion of fraud, cause the packages to be opened and examined in the presence of two respectable merchants, and if they agree with the entries, they are to be repacked at the expense of the United States, but if they differ they are to be forfeited, unless the difference arises from mistake or accident.

If the “actual cost” be *less* than the market price at the place of export, but the sale was *bona fide*, the forfeiture is

not incurred. But this provision in regard to *actual cost* does not apply to cases of voluntary gift, nor to those where the consideration is partly money and partly love and affection.

False manifests. A manifest is a paper signed by the master, containing the names of the places from which and to which the goods are shipped—the particular kinds of merchandize—the name, description, and built of the ship—her admeasurement, or tonnage, and place to which she belongs—and the names of the owners, according to the register, and of the master or commander, and of the consignees, agreeably to the bills of lading—together with the names of the passengers, both cabin and steerage, and their baggage.

If goods are imported into the United States without such manifest, or not agreeing therewith, the master forfeits equal to the value of the goods not included; and all goods not included belonging to the master, mate, officers, and crew, are subject to forfeiture, unless the error was accidental.

Every master of a ship belonging in whole or in part to a citizen of the United States, *bound in*, shall, any where within four leagues of the coast, or in any bay, harbor, &c., upon demand of an officer of the customs, produce a copy of the manifest, to be certified by such officer on the back of the original and on the copy, and the time it was delivered, to be transmitted to the officer of the port of destination. The master shall also deliver a like copy to the first officer who comes on board at the port of destination, and like certificates are to be made and the copies delivered to the collector; and the master is to produce to him, also, the original manifest, and if nothing is certified on it, he is to make oath that no officer has applied and no endorsement has taken place on any manifest.

Any neglect or refusal of the master to comply with any of these particulars, subjects him to a penalty of not exceeding five hundred dollars; and any neglect or refusal of the officer first coming on board to perform his duties, subjects him to a like penalty.

Unlading without entry. If this is done within a collection district, or any where within four leagues of the coast, without

authority from the officer of the customs, the master and mate, or the officers first and second in command, shall severally forfeit one thousand dollars, and the goods shall be forfeited except in cases of unavoidable accident, necessity, or distress, the officer and mate and one other mariner making oath of the casualty to the collector or officer of the customs—but this is no defence in court, unless the proof shall have been thus made to such officer.

If the goods thus unladen (and not excepted) shall be received on board any other vessel, the master of the receiving vessel, and every one aiding and assisting, shall forfeit and pay treble the value, and the goods shall be forfeited.

The master of a vessel arriving from a foreign port must, within twenty-four hours, or as soon after as the business hours at the custom-house will permit, make *report* to the chief officer, and within forty-eight hours after to the collector, in the form and containing all the particulars required in the *manifest*, and shall make oath to the truth of it before the collector on penalty of *one thousand dollars*.

Vessels from foreign ports, departing or attempting it before report or entry, unless to proceed to an interior district or from necessity, the master shall forfeit *four hundred dollars*, and any collector, naval officer, surveyor, or commander of a revenue cutter, may arrest and bring her back to the most convenient port.

Frauds upon debentures and bounties. A debenture is a certificate of drawback of duties *paid* or *secured by bond*, being an obligation by the collector, in behalf of the government, to refund the duties or cancel the bond on proof of landing the goods in a foreign port. The importer, to entitle himself to the debenture, must give bond in double the amount, that the goods shall be exported and not re-landed. If the duties shall have been paid, the debenture is made payable in fifteen days after signing the bond—if otherwise, it is payable when the duties shall become due, or any time thereafter, if the goods shall be exported within three years from the time of their importation.

These debentures are assignable by delivery and assignment ; and to maintain their credit a speedy mode of recovery of the sum and interest, by the possessor or assignee, is provided against the original grantee or any endorser.

Relief may be granted by the Secretary of the Treasury where from accident the entry shall not have been perfected in time to obtain the debenture, and provision is made for canceling the bond given by the grantee of the debenture.

If goods entered for exportation for drawback or allowance, shall be re-landed within the United States, the goods and vessel shall be forfeited, together with all vessels and boats concerned in re-landing, and all persons concerned therein shall suffer imprisonment not exceeding six months. False entries for purposes of drawback or bounty, subject the owner or *person making such entry* to forfeiture of the goods or their value, and *the latter* to the additional penalty of the value of the goods so entered. Exception is made for cases of accident or mistake, without intention of defrauding the revenue.

Bounties have been given on vessels concerned in the fisheries. This is a *tonnage* bounty, and the vessel, if over twenty tons, must have been employed at sea four months, at least, in the last fishing season, between the last days of February and November. Any vessel of less than *twenty* and more than *five* tons, if it shall have landed at least twelve quintals of fish for every ton of her admeasurement during the season, is entitled to the bounty.

There is provision in these cases that the fishermen should be secured in their share of the bounty, and the owner must, previously to receiving the allowance, produce to the collector the agreement with the men, and a certificate subscribed by him, and verified on oath, of the time and manner the vessel shall have been employed.

If within one year after the payment of the bounty, it shall appear that any fraud shall have been practised in obtaining it, the vessel, if found within the district, shall be forfeited ; but if otherwise, the owner shall forfeit one hundred dollars. It is moreover required that the husband or managing owner,

together with the master, shall give bond with sureties in a sum from \$100 to \$1000, according to the tonnage, from five tons and upwards, to be forfeited if within two years the vessel shall have been employed in defrauding the revenue.

Bounties in the nature of drawbacks are allowed on *refined sugar* manufactured from the *foreign article*. But this fact must be verified by the oath of the exporter, and, if the collector requires it, by a certificate of some respectable sugar refiner. Notice of the intention to export must be given six hours previous to the officer of inspection of the port, with a particular description, who, upon his inspection and the articles delivered on board in his presence, shall certify to the collector the quantity and particulars. Bond must be given for the landing the article in a foreign port. The debenture is to be paid in thirty days after it is issued.

Any violation of the provisions of the law, subjects the article, vessel, and all other vessels and boats concerned, to forfeiture.

For the bounty on the exportation of *pickled fish* of the fisheries of the United States, the exporter must make entry with the collector of the port of export, specifying the names of the master, the vessel, and the place where they are intended to be exported, and the particular quantity, and make proof that they are of the United States fisheries. The fish must be inspected and so certified, and the exporter, after they are laden on board, must make oath of their character and the intent to export them, and give bond in double their value to export and not re-land them. But the bounty is not to be paid until six months from the date of the bond, nor until proof of exportation, nor without satisfactory evidence that they were cured with foreign salt on which the duty shall have been paid. For any fraud in the transaction, the fish or their value are to be forfeited.

Bounties are also allowed for the exportation of salted provisions, *salted*, and spirits *distilled from molasses*, within the United States; and like penalties and forfeitures are prescribed for frauds in these cases.

II. *Frauds in the collection.* If the officers of the customs were to combine with importers or exporters to speculate upon the revenues, it would be no easy matter to protect the treasury against such a combination. The collection department should therefore be well regulated, its principal officers be men of the highest character for talents and integrity, and the subordinates should be active, intelligent, and incorruptible. It is with these last that, in other countries, the smugglers find it most profitable to tamper; and it is not improbable that some in every country may be found to connive, for the sake of the reward, at frauds upon the revenue. And although the merchants of the United States are, as a class, distinguished for their honor and integrity, still, there are here, as every where else, those who are not proof against the temptation which high duties offer.

The officers of the customs who have the management and control of the collection, under the direction of the Treasury Department, are the *collector*, the *naval officer*, and the *surveyor*; subordinate to these are the *inspectors*, *weighers*, *gaugers*, *measurers*, *markers*, and *clerks*.

The *collector* is to receive all reports, manifests, and documents on the entry of vessels and goods, and record the manifests and receive the entries and (with the naval officer where there is one) estimate the duties. He is to take bonds to secure their payment, receive all monies, and grant the permits for the unlading and delivery of goods. With the approbation of the Treasury Department, he appoints the subordinates and provides store-houses with their appurtenances.

The *naval officer*, with the collector, estimates the duties, and keeps a separate record. He receives copies of all manifests and entries, and countersigns all permits, clearances, certificates, debentures, and other documents granted by the collector, and he examines and certifies the collector's abstract of duties and other accounts of receipts, bonds and expenditures. This officer was intended as a check upon the collector, to detect and correct his errors. Whether there is such an adverse interest and rivalry as to induce vigilance and fidelity in these

duties, may admit of some doubt. In the large ports, however, this officer is often called on to decide important questions as to the tariff, and where there is a difference of opinion between him and the collector, reference is made to the Secretary or Comptroller of the Treasury. The delay in his office is often complained of, but it must be recollected that *the whole of the entries* for duty, on all the merchandize by one vessel, is completed before re-examination in the naval office.

The *surveyor* is the out-of-door officer. He has the superintendence and direction of the inspectors &c., and reports to the collector their absence or neglect. He visits and inspects vessels which arrive, and reports them to the collector, and whether the masters have complied with the laws. He puts on board inspectors, examines all goods for import or export, and tries weights and measures, and ascertains the proofs of spirits, and the quantity, kind, and quality of wines, teas, and sugars, and generally performs all the out-of-door duties, subject to the direction of the collector. He has the charge of all the public stores. In districts where there is no naval officer nor surveyor, the collector performs the duties.

Officers of the customs are prohibited, on penalty of five hundred dollars, to be owner in any vessel, or act as agent for the owner of vessel or cargo, or be directly or indirectly concerned in any importations.

The fees of the officers are prescribed by law, and if any one shall demand or receive more, he forfeits two hundred dollars.

Inspectors, weighers, gaugers, &c., taking a gratuity or reward for services, or unfaithfully performing their duties, forfeit fifty dollars for the first offence, and for the second two hundred dollars, and are discharged the service.

If an officer of the customs directly or indirectly takes any bribe, reward, or recompense, for conniving at any false entry, he forfeits not less than two hundred nor more than two thousand dollars, and the person *offering* is subject to the same penalty.

Auxiliary to these officers are *appraisers*, in the principal

districts, who are appointed by the President and Senate, and have a fixed salary.

In the principal ports, there are, also, auditors, cashiers, and deputies to the collectors and surveyors, store-keepers, &c., and the collectors, naval officers, surveyors, and board of appraisers, have each their clerks.

In such a vast and complicated system, executed by so many hands, with strong temptations arising from high duties, that some peculations should be practised, would not be wonderful. Indeed, *perfect honesty* would be almost miraculous. Perfect as the system is, constant vigilance in the Treasury Department is indispensable to secure the public from frauds and defalcations.

III. *Embezzlement in receiving and disbursing officers.* The Secretary of the Treasury is the chief receiving officer in the last resort, and from him all the public money is dispensed. After the money is collected from the importer or payer of the taxes, it is, both *before* and *after* its receipt at the Treasury, subject to the embezzlement of those through whose hands it has to pass.

Every receiver of public money, not authorized to retain it as salary, pay or emolument, must render his *quarterly* account to the proper accounting officer of the Treasury, with the proper vouchers, within *three* months after the expiration of the quarter, if resident *within* the United States, and within *six* if in a foreign country, and on failure he is to be promptly reported to the President, and dismissed the service.

If any collector or receiver of the public money before it is paid into the Treasury shall fail to render his account, or to pay over as required by law, the Comptroller of the Treasury shall state his account, and certify it, to the Solicitor of the Treasury, who shall issue his warrant of distress against the delinquent and his sureties, and the officer may levy on the delinquent's goods and chattels, and for want thereof on his body, to remain in prison until lawfully discharged. And notwithstanding the commitment or absconding of the delinquent debtor, and for want of his goods and chattels sufficient, the officer may levy on those of the sureties, and the amount due shall be

a lien upon his and his sureties' lands, tenements, &c., which may be taken and sold, and the deed of the marshal or his deputy under a sale duly notified and made, shall convey all the title of such debtor or sureties.

The mode of proceeding is particularly prescribed, and a remedy is provided in case the party charged as a defaulter is aggrieved by the doings of the department in prosecuting the suit or in adjusting the accounts.

The clerks of the District Courts shall, within thirty days *after* the adjournment of each term, forward to the Solicitor of the Treasury a list of the judgments and decrees rendered during the term, in which the United States are a party, and the marshals shall, within thirty days *before* the commencement of the term, report to the Solicitor the executions and other process for collection which shall have been put into their hands.

All executions upon any judgment obtained for the use of the United States shall run into all the States and Territories, but must be issued from and returned to the court where the judgment was obtained.

No money appropriated by any act of Congress shall be paid over to any person for his compensation who is in arrears to the United States, until he shall have accounted for and paid into the Treasury all sums for which he may be liable; but any balance arising from depreciation of treasury notes issued during or on account of the war of 1812, is excepted, and provision is made that a suit shall, on the demand of the supposed defaulter, be commenced, to ascertain if the balance claimed is, in whole or in part, due.

When estates of their insolvent debtors shall be assigned to the United States, the Solicitor of the Treasury, with the approbation of the Secretary, may sell the same for the best price that can be obtained, and make all proper conveyances; and in all sales on executions at the suit of the United States, any agent appointed by the Solicitor of the Treasury may purchase in their behalf, not exceeding the amount of the debt and costs, and the marshal may take the conveyance to the United States, and the Solicitor may sell the same, as in the case of assignment by insolvent debtors.

CHAPTER EIGHTH.*

MARITIME OFFENCES.

The jurisdiction of the United States is properly made exclusive of the States upon the high seas and beyond the maritime limits of the county. The extra-territorial offences committed against the *United States* are *piracy, destruction of vessels, crimes in foreign ports, felonious assaults, &c., mutiny, and abandoning seamen abroad.*

SECTION I.—PIRACY.

Having in a former part of this work, (Book I, Part II, Chap. VI,) in enumerating and defining the different powers granted to the General Government, examined the power to define and punish piracy, and the laws of Congress to carry it into effect, very little will be required to be added in this article. By the temporary acts of Congress of 3d March, 1819, and 15th May, 1820, made perpetual by that of 30th January, 1823, *robbery* upon the high seas, or in any open roadstead, or in any basin or bay, or in any river where the sea ebbs and flows, upon any ship or vessel, or upon any of the ship's company of any ship or vessel, is *piracy*, and punished with death.

And if a person be engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from the same and commit robbery, he shall be adjudged a pirate, and suffer death.

* Story's Abbot. Const. and Laws U. S. and Maine.

The trial is to be had in the district where the offender is found or first brought, but nothing is to deprive the State of its jurisdiction of offences committed within the body of a county, nor to authorize the United States to try such offenders after conviction or acquittal in a State court.

By the same acts, the *slave trade* is made PIRACY; and any *citizen* of the United States, being of the crew or ship's company of a *foreign* ship or vessel engaged in the slave trade, or *any* person, whether citizen or foreigner, being of the crew or ship's company of any ship or vessel owned in whole or in part by a citizen, landing on a foreign shore from such ship or vessel, and seizing any negro or mulatto not lawfully held in service by the laws of either of the States or Territories, with intent to make him a slave, or who shall decoy or forcibly bring or carry, or receive him on board with such intent, shall be adjudged a *pirate*.

Any person, of either of the descriptions, who shall forcibly confine or detain on board of such ship or vessel, (or aid or abet in doing it) any negro or mulatto, (not held in lawful service) with intent to make him a slave, or shall, on board, offer or attempt to sell him as a slave, or on the high seas or any where on tide water transfer or deliver him over to any other ship or vessel, with intent to make him a slave, or shall land or deliver him on shore, having sold or intending to sell him, shall also be adjudged a *pirate*.

To carry into effect these laws against piracy, the President of the United States is authorized to instruct the commanders of the public armed ships to subdue, seize, take and send into port any armed vessel which shall have attempted any piratical aggression upon any *vessel* or *citizen*, and to *retake* any vessel belonging to the United States or a citizen.

Commanders of merchant vessels owned in whole or in part by citizens, may defend against any armed vessel, (not a public armed vessel of a nation in amity with the United States) and subdue and capture her, and may retake any vessel thus owned and send her into any port of the United States. The captures made under these provisions may be condemned to the use of the captors.

Piratical vessels captured may be tried and condemned to the use of the captors, in the district where brought in, by any court having admiralty jurisdiction, and *any* person who shall have committed piracy on the high seas, *as defined by the law of nations*, and shall be brought into or found in the United States, shall be tried in the district into which he may be brought, or where found, and on conviction shall suffer death.

SECTION II. — OFFENCES IN FOREIGN PORTS.

Until the act of 3d March, 1825, the courts of the United States had no jurisdiction of crimes committed by persons on board of our ships in a foreign country and within the jurisdiction of its sovereign. The question arose in a case of manslaughter committed on board of an American merchant ship, in the river Tigris, in the empire of China, and it was determined that, by the then existing laws, the court could not take cognizance of the crime. Whereupon it was provided by that act, that “if any offence shall be committed on board of any ship or vessel belonging to any citizen of the United States, while lying in a port or place within the jurisdiction of any foreign State or sovereign, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offence shall be cognizable and punishable by the proper Circuit Court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas and without the jurisdiction of such foreign sovereign or State”—with a proviso, protecting the person from trial after he shall have been tried and acquitted or convicted in any competent court of such foreign State or sovereign.

SECTION III.—FELONIOUS ASSAULTS.

Any person who, on the high seas, or in any arm of the sea, &c., within the admiralty jurisdiction and out of that of any particular State, on board of any vessel belonging, in whole or in part, to the United States or any citizen or citizens, shall, with a dangerous weapon, or with intent to kill, rob, steal, commit mayhem or rape, or perpetrate any other felony, commit an assault on another, he shall be punished by fine and confinement to hard labor, not exceeding *three thousand dollars and three years*.

SECTION IV.—DESTRUCTION OF VESSELS.

I. *Fraudulent shipwrecks*, when done and committed “within the body of a county,” are punishable by the laws of the State, provided they do not amount to *piracy*. If they do, or are committed on the high seas, they are cognizable *exclusively* by the courts of the United States. The line of distinction, in many cases, is not easily drawn, and offenders may escape by pleading to the jurisdiction of the court. But the difficulty in this class of cases does not arise from any conflict of jurisdiction, but in ascertaining the *facts* in regard to the place where the offence was committed, and in defining the maritime limits of *the body of a county*. The cases of fraudulent shipwrecks now under consideration are those where the offenders have an interest in the ship or voyage; and here the State limits the jurisdiction to *the body of the county*, and the United States limit theirs to the *high seas*. Whatever criminal jurisdiction might be conferred by Congress on their courts of admiralty, in this description of cases, occurring in arms of the sea, bays, and navigable rivers, it seems no such jurisdiction has been

given, and until it shall be, wherever the body of the county *ends* and the high seas *begin*, there is the line of distinction, between the Federal and State courts.

How far Congress *might* extend the admiralty jurisdiction in criminal cases, so as to reach within the body of a county, and even *within* the ebb and flow of the tide, and whether this jurisdiction might be exclusive of or concurrent with that of the States, are questions for Congress in the first instance, and the Supreme Judiciary finally to settle. If, in criminal cases, the admiralty may be *defined*, that is extended or restricted, as Congress may deem expedient, subject only to such restriction as the Federal Judiciary might prescribe, and the admiralty power should become exclusive in the United States Courts, the State jurisdiction on their rivers and shores might be very much circumscribed. But in *this* description of cases the State leaves it precisely where the United States take it up.

By the laws of Maine, it is provided that if any owner of, or captain or other mariner belonging to, any ship or vessel, shall, *within the body of a county*, wilfully cast away, burn, sink or destroy any ship or vessel, or direct or procure it to be done, with intent or design to prejudice any one who has underwritten or may underwrite, or any merchant that shall load goods thereon, or any owner, the offender is punished by imprisonment not less than five years or *for life*. And if any owner shall fit out any ship or vessel with intent that the same shall be wilfully cast away, burnt or destroyed, to the prejudice of the owner of goods on board, or of such underwriter, the offender is punished by fine not exceeding five thousand dollars or confinement to hard labor not exceeding five years.

And if any owner of vessel or goods shall make out, or cause to be made out, any false or fraudulent bills of parcels, invoices or estimates of goods, laden or pretended to be laden on board, with intent to defraud any underwriter, the offender is punished by fine not exceeding five thousand dollars, or confinement to hard labor not exceeding five years.

And the same penalties are incurred, if any captain, mate or mariner of any ship or vessel shall make out and swear to any

false affidavit or protest, or if any owner of vessel or goods shall procure or knowingly exhibit such false paper, with intent to defraud or deceive any underwriter.

By the laws of the *United States*, any person *not* an owner, who shall, *on the high seas*, wilfully and corruptly cast away, burn or destroy any ship or other vessel unto which he belongs, being the property of any citizen or citizens of the *United States*, or procure the same to be done, shall *suffer death*.

For the same act, by an owner or part owner, with intent or design to prejudice any past or future underwriter, or of any merchant having goods on board, or of any other owner, the punishment also is *death*.

If any person, on the high seas, or within the *United States*, shall wilfully and corruptly *conspire, combine and confederate* with any other, either within or without the *United States*, to cast away, burn or otherwise destroy any ship or vessel, or to procure it to be done, with intent to injure any underwriter, past or future, or any lender on bottomry or respondentia, or shall, within the *United States*, build or fit out any ship or vessel, or aid in doing it, with intent that the same shall be cast away, burnt or destroyed, for the same purpose or design, the punishment is fine, and confinement to hard labor, not exceeding *ten thousand dollars* and *ten years*.

At first view, it might seem that the punishments here prescribed by the State Legislature and by Congress, for the same offence, were *disproportionate*. But it will be perceived that, if the punishments are different in severity, so are the crimes in malignity; the perpetrator on the *high seas* puts to greater hazard the lives on board, and has greater means to escape detection.

II. The next class of cases embraces acts of violence committed by those who have no interest in the ship or cargo.

If any person or persons, upon the high seas, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the *United States*, and out of the jurisdiction of any particular State, shall, by surprise, force or open violence, maliciously attack or set upon any ship or vessel be-

longing, in whole or in part, to the United States, or to any citizen or citizens of the United States, or any other person whatever, with intent unlawfully to plunder the same ship or vessel, or to despoil the owner or owners of any money, goods or merchandize laden on board, every person so offending, with counsellors, aiders and abettors, shall be deemed guilty of *felony*, and be punished by fine not exceeding five thousand dollars, and by imprisonment to hard labor not exceeding *ten years*.

III. There is still another class of offenders, notorious for a different kind of atrocities committed upon ships and vessels and their cargoes and crews, upon *the sea-shores*. They are a sort of *frebooters*—not pirates exactly, but offenders of nearly as deep malignity—known by the appellation of “*wreckers*,” and sometimes “*moon-cursers*,” from the fact that a moon-light night is unfavorable to their operations. Their trade is *plunder*, and to effect their purpose they decoy vessels on shore by false signals, that they may plunder from the shipwreck; and to prevent detection they not unfrequently murder the crew or cause them to perish. This is usually effected in stormy or tempestuous nights, by false lights moving along the beach or shore, attracting the mariner to the most dangerous part of the coast.

The ninth section of the act of 3d March, 1825, was specially aimed at this class of offenders. It provides that any person who shall plunder, steal, or destroy any money, goods, merchandize, or other effects from or belonging to any ship, vessel, boat or raft, which shall be in distress, wrecked, lost, stranded or cast away, upon the sea, or in any place within the admiralty and maritime jurisdiction of the United States—or who shall wilfully obstruct the escape of any person endeavoring to save his life from such ship or wreck, or who shall hold out any *false* or extinguish any *true* lights, with intent to bring the ship, while sailing upon the sea, into danger, &c., the offender, his counsellors, aiders and abettors, shall be deemed guilty of felony, and be punished by fine, and confinement to hard labor, not exceeding *five thousand dollars* and *ten years*.

In former times, the crimes against which this section of the

act of 1825 provides, were frequent on the coasts ; and of late they have been perpetrated on the shores of Florida, especially on *the keys*. It is understood that many of the "*wreckers*" there have lured vessels on shore that have attempted to follow in their wake, for the purpose of salvage in getting them off.

SECTION V.—MUTINY.

Mutiny is to make or to endeavor to make a revolt in the vessel, by resisting the lawful command of the master, or by stirring up and inducing others to do it.

By the Rules and Articles of the Navy, if any person in the Navy of the United States shall make or attempt to make any mutinous assembly, he shall, on conviction thereof, *suffer death* ; and any person who shall utter any seditious or mutinous words, or shall conceal or connive at any mutinous or seditious practices, or shall treat with contempt his superior, being in the execution of his office, or, being a witness to any mutiny or sedition, shall not do his utmost to suppress it, shall be punished at the discretion of a Court Martial.

The endeavor of the crew of a merchant vessel, or any one or more, to overthrow the authority of the master, with intent to remove him from his command, is mutiny.

So also to take possession of the vessel by assuming the command of her, or by transferring obedience from the lawful commander to some other person. And any combination to disobey or resist the lawful orders of the master, or to induce others to refuse or neglect their proper duty, or betray their trust, is mutiny.

By the act of Congress of 3d March, 1835, any person, being of the crew of any vessel of a citizen, who, on the high seas or within the admiralty and maritime jurisdiction of the United States, shall unlawfully and wilfully, with force or fraud, threats or other intimidation, usurp the command, or prevent

the commander in the exercise of his authority, is to be adjudged guilty of *revolt and mutiny*, and shall incur either or both the punishments of not exceeding one thousand dollars fine and *five years* imprisonment. And any *attempt* to excite to revolt and mutiny incurs either or both the punishments of not exceeding one thousand dollars fine and *five years* imprisonment.

At times, the master from necessity exercises the right of sovereign control, and obedience to his will, and even to his *caprices*, becomes almost indispensable.

But it is his duty to observe a kind, decorous and just conduct towards the passengers and crew under his charge, and every violation of his duty in these respects is punished with exemplary severity. He is expected to provide comfortable food and necessaries, and to set an example, by respectful treatment and civil deportment. By many of the sea laws he was finable even for abusive expressions.

By the same act of 3d March, 1835, if the master or other officer of any vessel of a citizen, on the high seas or within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred or revenge, and without justifiable cause, beat, wound or imprison any of the crew, or withhold from them suitable food or nourishment, or inflict on them any cruel or unusual punishment, he incurs either or both the penalties of not exceeding two thousand dollars fine and *five years* imprisonment.

SECTION VI. — ABANDONING SEAMEN ABROAD.

If any master or commander of a ship or vessel belonging, in whole or in part, to any citizen or citizens, shall, during his absence abroad, maliciously and without any justifiable cause, force any officer or mariner on shore, or leave him behind, in any foreign port or place, or refuse to bring home again all such of the officers and mariners of such ship or vessel whom he

carried out with him as are in a condition and willing to return when he shall be ready to proceed on his homeward voyage, he shall be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding six months.

Criminal prosecutions are, by the laws of the State, limited to six years next after the commission of the offence, except for treason, murder, manslaughter and arson, and unless where the accused shall have fled from justice. The limitation, by the State law of the prosecution for treason is three years, and by special provisions lesser offences are limited to shorter periods.

By a law of the United States of 1790, the limitation for treason and other capital offences, except murder and forgery, is *three years*, and for offences not capital *two years*.

By the act of 1818, prohibiting the slave trade, the indictments are limited to *five years*. By the act of 1820, this trade is made *piracy*, and punished with *death*, without prescribing any limitation. The result is *probably*, that, by the laws of the United States, *piracy*, as well as murder and forgery, is excepted from any limitation.

Prosecutions for violations of the revenue laws or the act regulating seamen on board of public and private vessels of the United States, are limited to *five years*. For fines and forfeitures incurred under penal statutes and for infringing patent and copy rights, the limitation is *two years*. The period in all these cases is to be reckoned from the time of committing the crime to the finding the indictment.

In this brief review of the criminal law of the State and United States will be seen an *outline* of the rights and obligations of every one, as a citizen or member of the State and United States. We may all, in the character of *accusers* or *accused*, be subject to the tribunals of justice, and it is important to know to which of them we may be summoned to answer for crimes and offences, or to which we may resort for protection and redress.

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ADDITIONS AND CORRECTIONS.

Page 51. In case of *poll tax*, instead of "sixteen" read *twenty-one*. This error is corrected, however, in page 237.

Page 107. For "retractively" read *retroactively*.

Page 108. The clause should read, "The application [for the patent] must be signed by the applicant and two witnesses, and sustained by his oath."

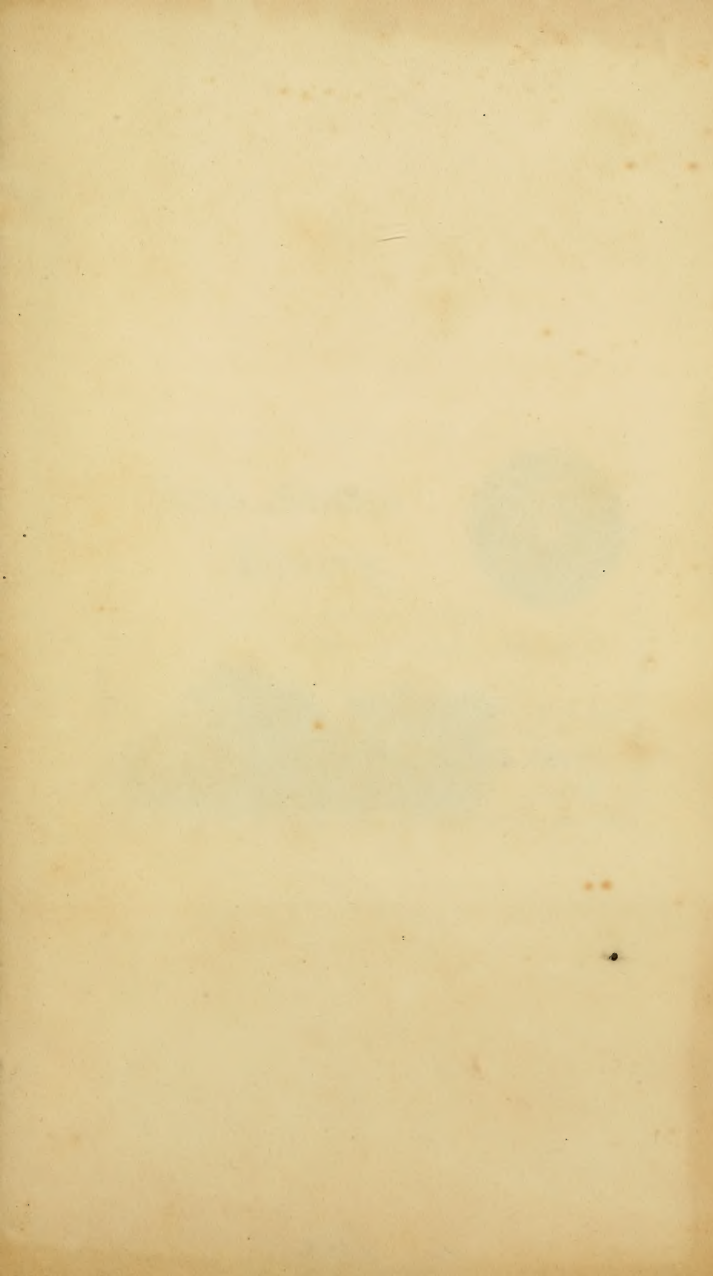
Page 137. Add at the close of Section 2—"In case no one has a majority of all the electors for Vice President the election is to be made by the Senate, from the two highest numbers on the list; two thirds of the members are required for a quorum, and a majority of the whole number for a choice."

Page 179, Note. For "Homilly" read *Romilly*.

Page 269, Note. For "Benede" read *Benecke*.

Page 473, paragraph 5, line 2. For "any *other* foreign current coin," &c. read "any foreign current coin," &c.





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